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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ATTALA COUNTY, MISSISSIPPI, *et al.*,

Petitioners,

v.

BERNARD TEAGUE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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123 pp

QUESTIONS PRESENTED

1. Whether a presumption that Respondents have established a violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, by offering statistical evidence that black and white voters prefer different candidates conflicts with *Johnson v. De Grandy,* 512 U.S. 997 (1994), which holds that such evidence does not suffice to establish a § 2 violation and which directs courts to engage in a "comprehensive, not limited, canvassing of relevant facts."

2. Whether the Court of Appeals' decision conflicts with *Thornburg v. Gingles,* 478 U.S. 30 (1986), and the plain language of § 2 of the Voting Rights Act by rejecting Petitioners' claim that black and white voters prefer different candidates for reasons other than race or partisan politics.

LIST OF ALL PARTIES BELOW

The parties to this proceeding in the court below were as follows: Attala County, Mississippi; the Attala County, Mississippi Democratic Executive Committee, by and through its Chairperson, Don Hayes; the Attala County, Mississippi Republican Executive Committee, by and through its Chairperson, Scott Wiggers; the Attala County, Mississippi Election Commission, by and through its Chairperson, Mildred Case; Bernard Teague; Leroy Gladney; L.B. Winters; and the United States of America as Intervenor.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. THE COUNTY'S SINGLE-MEMBER DISTRICT ELECTION SYSTEM	2
II. THE TRIAL	2
III. THE FIRST APPEAL	4
IV. PROCEEDINGS ON REMAND	5
V. THE SECOND APPEAL	8
REASONS FOR GRANTING THE WRIT	13

Page

I. THE COURT OF APPEALS' DECISION, WHICH RELIED UPON A PRESUMPTION THAT RESPONDENTS HAVE ESTABLISHED A VIOLATION OF § 2 OF THE VOTING RIGHTS ACT BY OFFERING STATISTICAL EVIDENCE THAT BLACK AND WHITE VOTERS PREFER DIFFERENT CANDIDATES, CONFLICTS WITH *JOHNSON v. DE GRANDY*, WHICH HOLDS THAT SUCH EVIDENCE DOES NOT SUFFICE TO ESTABLISH A § 2 VIOLATION AND WHICH DIRECTS COURTS TO ENGAGE IN A "COMPREHENSIVE, NOT LIMITED, CANVASSING OF RELEVANT FACTS" 14

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *THORNBURG v. GINGLES* AND THE PLAIN LANGUAGE OF § 2 BY REJECTING PETITIONERS' CLAIM THAT BLACK AND WHITE VOTERS PREFER DIFFERENT CANDIDATES FOR REASONS OTHER THAN RACE OR PARTISAN POLITICS 20

Page

CONCLUSION 25

APPENDIX

Teague v. Attala County, Miss., 807 F. Supp. 392 (N.D. Miss. 1992) ..... App. 1

Teague v. Attala County, Miss., 17 F.3d 796 (5th Cir. 1994) ..... App. 26

Teague v. Attala County, Miss., C.A. No. 1:91CV209-D-D (N.D. Miss. Mar. 20, 1995) ..... App. 32

Teague v. Attala County, Miss., 92 F.3d 283 (5th Cir. 1996) ..... App. 58

Teague v. Attala County, Miss., Denial of Petition for Rehearing and Suggestion for Rehearing En Banc ..... App. 86

Voting Rights Act of 1965, as amended, § 2, 42 U.S.C. § 1973 ..... App. 88

TABLE OF AUTHORITIES

Page

Cases:

African American Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 913 (1996) 17

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 19

Clark v. Calhoun County, Miss., 21 F.3d 92 (5th Cir. 1994) 12, 16

Clarke v. City of Cincinnati, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1960 (1995) 17

Georgia v. United States, 411 U.S. 526 (1973) 2

Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103 (3d Cir. 1993), *cert. denied*, 512 U.S. 1252 (1994) 16

Johnson v. De Grandy, 512 U.S. 997 (1994) .... *passim*

League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 471 (1994) 12, 21, 23

Lewis v. Alamance County, N.C., 99 F.3d 600 (4th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3632 (U.S. Mar. 4, 1997) (No. 96-1404) 16

Page

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 24, 25

NAACP, Inc. v. City of Niagara Falls, N.Y., 65 F.3d 1002 (2d Cir. 1995) 16

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1795 (1995) ..... *passim*

Rollins v. Fort Bend Indep. Sch. Dist., 89 F.3d 1205 (5th Cir. 1996) 17

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 25

Sanchez v. Colorado, 97 F.3d 1303 (10th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3648 (U.S. Mar. 13, 1997) (No. 96-1452) 16-17

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 24, 25

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*

Uno v. City of Holyoke, 72 F.3d 973 (1st Cir. 1995) 17, 22

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

Page

Voting Rights Act of 1965, as amended
§ 2, 42 U.S.C. § 1973 ..... *passim*
§ 5, 42 U.S.C. § 1973c 2
42 U.S.C. § 1983 3-4

Supreme Court Rules:
Rule 12.5 1
Rule 13 1

Other Authority:
U.S. Bureau of the Census, 1992 Census of Governments, Vol. 1, Government Organization, No. 1 (Mar. 1994) 13

OPINIONS BELOW

The District Court's initial non-liability opinion is reported at 807 F. Supp. 392 (N.D. Miss. 1992), and is reproduced below at Appendix ("App.") 1-25. The Fifth Circuit's first opinion is reported at 17 F.3d 796 (5th Cir. 1994), and is reproduced at App. 26-31. The District Court's second non-liability opinion is unreported, C.A. No. 1:91CV209-D-D (N.D. Miss. Mar. 20, 1995), and is reproduced at App. 32-57. The Fifth Circuit's second opinion is reported at 92 F.3d 283 (5th Cir. 1996), and is reproduced at App. 58-85. The Fifth Circuit's denial of Petitioners' petition for rehearing and suggestion for rehearing en banc is unreported, and is reproduced at App. 86-87.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on August 8, 1996. Petitioners filed a petition for rehearing and suggestion for rehearing en banc on August 21, 1996, which the Fifth Circuit denied on January 22, 1997. This Petition for a Writ of Certiorari is being brought to this Court within 90 days of the denial of the petition for rehearing, as required by Supreme Court Rule 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Petition is not a cross-petition and Petitioners know of no party who intends to file such a petition; thus, the provisions of Supreme Court Rule 12.5 do not presently apply.

STATUTORY PROVISIONS INVOLVED

This appeal involves § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The text of this statute is set forth at App. 88.

STATEMENT OF THE CASE

I. THE COUNTY'S SINGLE-MEMBER DISTRICT ELECTION SYSTEM

Petitioner Attala County, Mississippi is 40% black, with a black voting-age population ("BVAP") of 35.44%. The County is governed by a five-member Board of Supervisors whose members are elected from single-member districts. The County last redrew these districts in the 1980's, and the United States Attorney General precleared this redistricting plan pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.[1]

According to the 1990 Census, two of the five districts (Districts 2 and 4) have a black majority and one (District 4) has a BVAP majority. Following the 1990 Census, the Department of Justice insisted that the County draw a second district with a BVAP majority. The County did not have to redraw its districts, however, because the districts drawn in the 1980's were still of approximately equal population, and therefore satisfied the "one person, one vote" rule.

II. THE TRIAL

Respondents Teague, Gladney, and Winters, who are black voters in Attala County, brought suit, alleging that the districts drawn in the 1980's violated § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C.

[1]Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires certain jurisdictions to obtain prior approval, known as "preclearance," of changes in laws, practices, or procedures affecting voting. *See Georgia v. United States*, 411 U.S. 526, 534-35 (1973) (holding that § 5 applies to redistricting plans). To obtain preclearance, such jurisdictions must prove either to the United States Attorney General or to a three-judge district court in the District of Columbia that the proposed change has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c.

§ 1973, which prohibits voting laws, practices, or procedures that "result[]" in minorities having less opportunity than others to participate in the political process and elect representatives of their choice.[2] Respondents claimed that it was possible to draw a second district with a substantial BVAP majority and that the County's failure to do so violated § 2. Respondents sought an injunction against further use of the plan drawn in the 1980's and the implementation of a new plan with two districts with substantial BVAP majorities. In other words, Respondents sought a plan in which 40% of the districts had BVAP super-majorities, even though blacks constitute only 35% of the voting-age population of the County.

At trial, Respondents sought to prove the three necessary preconditions for § 2 liability described by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).[3] In particular, Respondents offered expert testimony that voting in County elections was polarized on racial lines. Petitioners countered with evidence showing flaws in Respondents' methodology. Petitioners also offered evidence of nonracial explanations for voting behavior in the County, such as evidence that voters cast their ballots based on the candidates' qualifications and experience.

The District Court, which had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C.

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[2]The United States subsequently intervened as a plaintiff, and is one of the Respondents in this Court.

[3]In *Gingles*, this Court held that a § 2 plaintiff must prove, *inter alia*, that (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive"; and (3) the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

§ 1983, held that Respondents had failed to carry their burden of proving impermissible vote dilution under § 2. 807 F. Supp. at 405-06 (App. 25). The District Court found that Respondents had proved the first *Gingles* precondition, in that it was possible to draw a second BVAP majority district. *Id.* at 402 (App. 16-17). The District Court also found, however, that Respondents had failed to prove the second and third preconditions (black political cohesion and white bloc voting). *Id.* at 402-04 (App. 17-21). The District Court further held that, even if Respondents had been able to prove all three *Gingles* preconditions, they had nonetheless failed to establish liability under § 2, because the totality of circumstances demonstrated that blacks in Attala County have an equal opportunity to participate in the political process and elect representatives of their choice. *Id.* at 404 (App. 21).

III. THE FIRST APPEAL

The Fifth Circuit reversed and remanded for "revised findings of fact and conclusions of law that will directly evaluate [Respondents'] statistical evidence and will more comprehensively refer to the other evidence in the record, tying that evidence directly to the *Gingles* preconditions." 17 F.3d at 798 (App. 30-31). While conceding that the District Court "is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists," the Fifth Circuit held that the District Court should have evaluated Respondents' statistical evidence in more detail. *Id.* (App. 30). The Fifth Circuit made clear, however, that it was not suggesting how the vote dilution claim before the District Court should ultimately be decided. *Id.* (App. 31).

IV. PROCEEDINGS ON REMAND

On remand, Respondents and the United States, which had been permitted to intervene as a plaintiff (and is among the Respondents in this Court), offered additional expert testimony regarding racial bloc voting. Petitioners countered this testimony with expert testimony of their own.

After carefully evaluating all the evidence offered before and after the remand, the District Court again ruled that Respondents had failed to prove the existence of racial bloc voting. The District Court began by observing that "[t]he issue of whether polarized voting currently exists in Attala County was hotly contested." C.A. No. 1:91CV209-D-D, slip op. at 11 (App. 44). The court then proceeded to discuss at length the evidence offered by Respondents' experts, who opined that voting in Attala County was polarized along racial lines. The District Court went on to observe that although the findings of Petitioners' expert were "similar to [those of Respondents'] experts," Petitioners' expert "disagreed vehemently with [Respondents'] experts on what the statistics actually prove in regard to racial polarization." *Id.* at 14 (App. 46).

After discussing the expert testimony at length, the District Court stated that "[e]ven though the court does not agree with [Respondents] as to the presumption of black political cohesion, there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County. However, such findings do not end the inquiry." *Id.* at 16 (App. 48). Instead, "courts must consider evidence of nonracial causes of voting preferences in analyzing particular § 2 claims." *Id.* (App. 49).

Applying this standard, the District Court then held that:

> [F]actors other than race influence voters in Attala County, and therefore, [Respondents have] failed to prove racial polarization. Factors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County. Conspicuously missing from the record in this cause is any proof to the contrary. Of the black-white elections analyzed, there is no proof in the record that in any way compares the candidates on any basis other than race.

Id. at 17 (App. 50) (citation omitted).

In support of this finding, the District Court discussed two elections in which it found black crossover voting (*i.e.*, blacks voting for white candidates), and cited testimony from District 3's supervisor, Troy Hodges, who testified that "'Race won't keep you from being elected,'" and that "'blacks won't vote for a candidate just because [the candidate] is black or white.'" *Id.* at 18-19 (App. 50-51). The court also cited testimony from H.L. Myrick, a local alderman who is black, that black and white citizens vote not on the basis of skin color but on the basis of the candidate and his/her qualifications. Alderman Myrick attributed his election to a strong white crossover vote and described many instances in which whites had given him political and financial support. *Id.* at 18 (App. 50-51). Based on this testimony of "established politicians," and its analysis of several elections, the District Court found that "black and white crossover voting

significantly impact election outcomes in Attala County." *Id.* at 18-19 (App. 51).

The court further found that Respondents had "failed to establish black political cohesion . . . and, more importantly, have failed to establish that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors, such as a candidate's experience, qualifications, education and contact with the electorate." *Id.* at 19 (App. 51). Consequently, the court concluded, Respondents' § 2 claim failed.

The court went on to hold that the § 2 claim would fail even if Respondents had proved all three *Gingles* factors. Examining the "totality of circumstances," as § 2 directs, the court found that blacks and whites in Attala County have an equal opportunity to participate in the political process and elect representatives of their choice and that the political processes leading to nomination or election in the County are equally open to blacks and whites. *Id.* at 19-20 (App. 52).

In support of this finding, the court observed that, although the County had a history of discrimination against blacks and that blacks registered and turned out at lower rates than whites, "other factors, such as voter apathy, have resulted in reduced registration and turnout." *Id.* at 20-21 (App. 52-53). Similarly, the court found that, although socioeconomic disparities between whites and blacks existed in the County, "voter apathy explains the depressed level of participation." *Id.* at 21-22 (App. 53-54).

The court went on to discuss the extent to which minority candidates had succeeded in winning elections in the County. The court noted that no black candidate had ever been elected as County Supervisor from a majority-

white district. The court stated that, although this factor favored Respondents, it did not mean that blacks were denied effective political participation in county affairs. *Id.* at 23-24 (App. 55-56).

Finally, the court observed that there was no evidence in the record suggesting a lack of responsiveness on the part of elected officials to the needs of the minority community. The court found, rather, that "established political veterans" had testified regarding "the necessity of support from black constituents." *Id.* at 24 (App. 56).[4]

Having analyzed the totality of circumstances, the District Court found that, even if Respondents had proved black political cohesion and white bloc voting, blacks in Attala County nonetheless "have the ability to participate in the political process and elect candidates of choice equal to that of others in the electorate." *Id.* (App. 56-57). In making this finding, the District Court acknowledged that "no one factor is outcome determinative; rather, the court looked to the record, taken as a whole, so as to provide an intensely local appraisal of blacks' ability to participate in the political process in light of past and present reality in Attala County." *Id.* at 24-25 (App. 57). Accordingly, the District Court entered judgment for Petitioners.

V. THE SECOND APPEAL

On appeal, the Court of Appeals again reversed. 92 F.3d at 285 (App. 59). Instead of remanding for more detailed findings of fact and conclusions of law, however, the Fifth Circuit rendered judgment for Respondents and remanded for the development and implementation of a remedial plan. *Id.* at 295 (App. 84-85).

In its opinion, the Court of Appeals conceded:

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[4]The court recognized, however, that this factor had a limited role in the totality of circumstances analysis. *Id.* (App. 56).

that the clearly erroneous standard of review applied, *id.* at 287 (App. 64);

that a district court hearing a § 2 challenge must engage in a fact-intensive, intensely local analysis, *id.* (App. 64);

that a district court has "discretion in the manner in which it weighs the facts," *id.* at 291 (App. 76);

that the District Court "'is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists,'" *id.* (App. 74) (citation omitted);

that "statistics do not capture all the reasons motivating a voter," *id.* (App. 74);

that "the ultimate inquiry of Section 2 is racial discrimination," *id.* at 295 (App. 84);

that a defendant in a § 2 case can "offer evidence of the nonracial reasons for the voting patterns" of blacks and whites, *id.* (App. 84);

that a § 2 defendant may rebut plaintiffs' proof of the *Gingles* factors by offering evidence that no racial bias exists in the relevant community, *id.* at 290 (App. 72); and

that even a finding that the three *Gingles* preconditions exist "does not end the inquiry" into whether § 2 has been violated, *id.* at 292 (App. 76).

Nonetheless, the Court of Appeals concluded that the District Court had clearly erred in finding no § 2 violation in Attala County. Ignoring the District Court's statement that Petitioners' expert "disagreed vehemently with [Respondents'] experts," C.A. No. 1:91CV209-D-D, slip op. at 14 (App. 46), the Court of Appeals found that the expert statistical evidence regarding racial bloc voting was essentially undisputed. *See* 92 F.3d at 291 (App. 74) ("[T]he district court did not even have to choose among competing opinions based on these statistics. The results of the regression analyses of both plaintiffs' and defendants' experts were consistent."). In so stating, the Fifth Circuit characterized Respondents' evidence as "compelling" and "strong," *id.* at 290, 291 (App. 71, 75), and chided the District Court for "refus[ing] to accord any presumption to the virtually unchallenged statistical case," *id.* at 291 (App. 74).

The Court of Appeals proceeded to reject the District Court's finding that factors such as a candidate's experience, qualifications and education are of greater significance than race to Attala County voters. *Id.* at 290-91 (App. 72-75). The Court of Appeals characterized the testimony underlying this finding as "anecdotal" and "conflicting," and stated that the District Court "should have found it ambiguous at best and certainly not dispositive." *Id.* at 291 (App. 74, 76).

The Court of Appeals also asserted that the District Court had "err[ed] by placing the burden on [Respondents] to disprove that factors other than race affect voting patterns in Attala County." *Id.* at 290 (App. 72). The Court of Appeals explained that:

> [p]laintiffs are to present evidence of racial bias operating in the electoral

> system by proving up the *Gingles* factors. Defendants may then rebut the plaintiffs' evidence by showing that no such bias exists in the relevant voting community. The district court betrays its misunderstanding of this burden-shifting when it concludes that "factors other than race influence voters in Attala County, and therefore, plaintiff has failed to prove racial polarization" on the basis of there being "no proof in the record that in any way compares the candidates on any basis other than race." Such a showing is for the defendants to make. The lack of evidence in the record on this point favors the plaintiffs, not the defendants. By the district court's own reasoning, then, the plaintiffs have prevailed in demonstrating racial bloc voting.

Id. (App. 72) (citations omitted). The Court of Appeals thus concluded that the District Court committed clear error in failing to find black political cohesion and white bloc voting. *Id.* at 291 (App. 75-76).

The Court of Appeals likewise deemed "clearly erroneous" the District Court's finding that blacks in Attala County have as much opportunity to participate in the political process and elect candidates of their choice as whites. *Id.* at 293 (App. 80). In reaching this conclusion, the Court of Appeals relied on a presumption that proof of the *Gingles* preconditions establishes a § 2 violation:

> "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to

> establish a violation of § 2 under the totality of circumstances. . . ."
>
> . . . Attala County is not that unusual case.

Id. (App. 80-81) (quoting *Clark v. Calhoun County, Miss.*, 21 F.3d 92, 97 (5th Cir. 1994)).

Applying this presumption, the Court of Appeals characterized the District Court's finding that Respondents had failed to prove vote dilution under the totality of circumstances test as "dubious, relying entirely on the denials of a few lay witnesses and ignoring the contrary testimony of others." *Id.* (App. 81). In particular, the Court of Appeals rejected the District Court's finding that depressed levels of black political participation were attributable to voter apathy, finding that socioeconomic differences between blacks and whites better explained the disparities between black and white political participation. *Id.* at 294-95 (App. 84).

In concluding that the District Court's decision must be reversed and judgment rendered for Respondents, the Court of Appeals stated that it was not denying that the "ultimate inquiry of Section 2 is racial discrimination." *Id.* at 295 (App. 84). While acknowledging that a defendant in a § 2 case is free to "offer evidence of the nonracial reasons for the voting patterns" of blacks and whites, as the Fifth Circuit held in *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 471 (1994) ("*LULAC*"), the court distinguished *LULAC* as a case that "concerned a different problem -- the role of partisan politics." 92 F.3d at 295 (App. 84). The Court of Appeals thus substituted its view of the evidence for that

of the District Court and rendered judgment for Respondents.

REASONS FOR GRANTING THE WRIT

This case presents an issue of overriding importance to state and local government entities across the nation, all of which are subject to § 2 and many of which will be required to reapportion following the 2000 decennial census to comply with the one person, one vote standard of the Fourteenth Amendment, while simultaneously attempting to avoid a violation of § 2.[5] The Court of Appeals' decision has dramatically and improperly reduced the burden of proof for plaintiffs in § 2 cases. Under the view adopted by the Court of Appeals, § 2 plaintiffs need to introduce little more than statistical evidence of racially polarized voting to satisfy their burden of proof. In the Court of Appeals' view, this statistical evidence will demonstrate both black political cohesion and white bloc voting, even if it is hotly disputed and even if defendants introduce unrebutted evidence that differences in black and white voting behavior result from causes other than racial animosity or partisan differences.

Even more significantly, according to the Court of Appeals, plaintiffs' statistical evidence will, by itself, establish a presumption -- rebuttable only in the very unusual case -- that defendants have violated § 2. This presumption will apparently apply even in a case like the present one, where the percentage of BVAP majority

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[5]As of January 1992, there were 84,955 units of local government below the state level. These governmental units included 3,043 county governments, 19,279 municipal governments, 16,656 town or township governments, 14,422 school district governments, and 31,555 special district/special purpose local government districts. U.S. Bureau of the Census, 1992 Census of Governments, Vol. 1, Government Organization, No. 1, at v. (Mar. 1994).

districts Respondents seek (40%) exceeds the BVAP of the County (35%). If this is the law -- and we respectfully submit that it is not -- then it represents a dramatic change in the law of § 2. Given the importance of such a change to state and local governments, this Court should grant certiorari and reverse the judgment for the reasons set forth below.

I. THE COURT OF APPEALS' DECISION, WHICH RELIED UPON A PRESUMPTION THAT RESPONDENTS HAVE ESTABLISHED A VIOLATION OF § 2 OF THE VOTING RIGHTS ACT BY OFFERING STATISTICAL EVIDENCE THAT BLACK AND WHITE VOTERS PREFER DIFFERENT CANDIDATES, CONFLICTS WITH *JOHNSON v. DE GRANDY*, WHICH HOLDS THAT SUCH EVIDENCE DOES NOT SUFFICE TO ESTABLISH A § 2 VIOLATION AND WHICH DIRECTS COURTS TO ENGAGE IN A "COMPREHENSIVE, NOT LIMITED, CANVASSING OF RELEVANT FACTS"

As the courts below observed, to establish a violation of § 2, plaintiffs must first prove (a) that the minority population is sufficiently numerous and geographically compact that an additional BVAP majority district could be drawn, (b) that the black population is politically cohesive, and (c) that the white majority can usually defeat the black community's preferred candidate by bloc voting. *Gingles*, 478 U.S. at 50-51. But as this Court held in *Johnson v. De Grandy*, 512 U.S. 997 (1994), proving the three *Gingles* factors does not suffice to establish § 2 liability. *Id.* at 1011. Instead, Plaintiffs must

also prove that the challenged redistricting plan denies them an equal opportunity to "participate in the political process" and "elect representatives of their choice." 42 U.S.C. § 1973.

In determining whether plaintiffs have satisfied this additional burden, courts must consider the "totality of circumstances," *id.*, and engage in a "comprehensive, not limited, canvassing of relevant facts." *De Grandy*, 512 U.S. at 1011. *Gingles* likewise mandates that courts make "a searching practical evaluation of the past and present reality . . . [to determine] whether the political process is equally open to minority voters." 478 U.S. at 79 (internal quotation marks and citation omitted).

The Court of Appeals gave lip service to *De Grandy*, admitting that "a finding of the three *Gingles* preconditions does not end the inquiry" and that courts should "look beyond the *Gingles* threshold factors when evaluating vote dilution claims." 92 F.3d at 292 (App. 76). Contrary to the express ruling of *De Grandy*, however, the Court of Appeals established a presumption that proof of the *Gingles* preconditions establishes vote dilution, stating:

> "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of

> a politically cohesive minority group is not violative of § 2 of the Voting Rights Act."

Id. at 293 (App. 80-81) (quoting *Clark*, 21 F.3d at 97).[6]

The presumption established by the Court of Appeals conflicts with *De Grandy* by limiting the "canvassing of relevant facts" and by failing to assess equal electoral opportunity "explicitly, and without isolating any other arguably relevant facts from the act of judgment." *De Grandy*, 512 U.S. at 1011, 1012. This presumption also conflicts with *Gingles*' requirement that courts engage in a "searching practical evaluation of the past and present reality" in deciding § 2 claims. 478 U.S. at 79 (citation and internal quotation marks omitted). Finally, the presumption conflicts with other appellate courts that have held that proof of all three of the *Gingles* preconditions does not suffice, by itself, to establish vote dilution. *See, e.g.*, *Nipper v. Smith*, 39 F.3d 1494, 1512 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1795 (1995).[7] In

[6]Other courts of appeals have similarly erred in creating this improper presumption. *NAACP, Inc. v. City of Niagara Falls, N.Y.*, 65 F.3d 1002 (2d Cir. 1995); *Clark v. Calhoun County, Miss.*, 21 F.3d 92 (5th Cir. 1994); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103 (3d Cir. 1993), *cert. denied*, 512 U.S. 1252 (1994).

[7]*See also Lewis v. Alamance County, N.C.*, 99 F.3d 600, 604 (4th Cir. 1996) (even if plaintiffs prove the *Gingles* preconditions, "[t]he ultimate determination of vote dilution under the Voting Rights Act still must be made on the basis of the totality of the circumstances" (internal citations, alterations, and quotation marks omitted)), *petition for cert. filed*, 65 U.S.L.W. 3632 (U.S. Mar. 4, 1997) (No. 96-1404); *Sanchez v. Colorado*, 97 F.3d 1303, 1310-11 (10th Cir. 1996) ("Under *De Grandy*, a court's examination of relevant circumstances is not complete once the three factors were found to exist . . . . Failure to prove the totality of circumstances establishes the

(Footnote continued)

short, contrary to the decisions of this Court, the Court of Appeals dramatically changed the law of § 2 by creating a presumption that proof of the *Gingles* preconditions establishes a violation of § 2. This change is particularly inappropriate in a case like the present one, where Respondents seek two BVAP majority districts (40%) in a county where blacks constitute only 35% of the voting-age population.

The Court of Appeals' error is particularly significant because that court also combined the second and third *Gingles* factors into a single statistical analysis of whether racially polarized voting existed and then held that the results of this analysis "create a strong presumption in favor of a finding of black political cohesion and racial bloc voting." 92 F.3d at 291 (App. 75). Thus, the Court of Appeals effectively collapsed the "totality of circumstances"

(Footnote continued)

minority is not harmed by the challenged practice and rebuts the inference of discrimination arising from proof of the three preconditions." (internal citations and quotation marks omitted)), *petition for cert. filed*, 65 U.S.L.W. 3648 (U.S. Mar. 13, 1997) (No. 96-1452); *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1213 (5th Cir. 1996) ("The Supreme Court's mandate to the district court is to analyze the district's voting practice by evaluating the three *Gingles* factors and then by looking at the totality of the circumstances."); *Uno v. City of Holyoke*, 72 F.3d 973,.981 (1st Cir. 1995) ("Even when the *Gingles* preconditions coalesce and thereby create an inference of discrimination, lack of equal electoral opportunity remains the central focus of the inquiry."); *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1355 (8th Cir. 1995) (*Gingles* factors are "necessary, but not sufficient, to establish a § 2 voting dilution violation."), *cert. denied*, 116 S. Ct. 913 (1996); *Clarke v. City of Cincinnati*, 40 F.3d 807, 811 (6th Cir. 1994) (once the *Gingles* preconditions are satisfied, court must then examine the totality of circumstances), *cert. denied*, 115 S. Ct. 1960 (1995).

inquiry -- a multi-factor analysis -- into a single-factor analysis of whether Respondents' experts had offered statistical evidence of racially polarized voting.

The Court of Appeals compounded its error by improperly substituting its view of the facts for that of the District Court on the question of whether Respondents had proved racial bloc voting. The District Court found that the expert testimony presented by the parties "on racial bloc voting patterns varied considerably," C.A. No. 1:91CV209-D-D, slip op. at 12 (App. 44), although that court found that the evidence favored Respondents, *id.* at 16 (App. 48). The District Court also concluded, however, that such findings "do not end the inquiry." *Id.* (App. 48). Relying on the testimony of both black and white politicians in the County, the District Court found that county voters cast their ballots not on the basis of race but, rather, on the candidates' qualifications, education, contact with the electorate, and experience. *Id.* at 17-18 (App. 50-51).

Gingles makes clear that these findings are subject to reversal only if "clearly erroneous," because the determination of whether the political process is equally open to minority voters "'is peculiarly dependent upon the facts of each case,' and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." 478 U.S. at 79 (citation omitted).

Notwithstanding the mandate of *Gingles* and the District Court's finding that the testimony of Petitioners' and Respondents' experts "varied considerably," the Court of Appeals treated the expert testimony as essentially undisputed. 92 F.3d at 291 (App. 74). The Court of Appeals conceded that "statistics do not capture all the reasons motivating a voter," *id.* (App. 74), and recognized

that "the court does have discretion in the manner in which it weighs the facts," *id.* (App. 76). But the Court of Appeals proceeded to characterize the County's non-statistical evidence as "conflicting," "ambiguous at best and certainly not dispositive." *Id.* (App. 74, 76).

The Court of Appeals further found that Respondents' statistical evidence outweighed the nonracial explanations offered by Petitioners, 92 F.3d at 291-92 (App. 75-76), even though "[n]o single statistic provides courts with a shortcut to determine whether a set of [electoral structures] unlawfully dilutes minority voting strength." *De Grandy*, 512 U.S. at 1020-21, *cited in Nipper*, 39 F.3d at 1527. But a contrary finding by the Court of Appeals merely because it weighed the evidence differently from the District Court changes the clearly erroneous standard to one of *de novo* review.

The wholesale reweighing of disputed statistical evidence and expert testimony on the crucial issues of minority political cohesion and white bloc voting is contrary to *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985). In *Anderson*, this Court held that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74. Under *Anderson*, where there are two permissible views of the evidence, the factfinder's choice between the two cannot be clearly erroneous. *Id.* at 574. Here, the Court of Appeals violated *Anderson* by "weigh[ing] the evidence differently" than the District Court even though the District Court's view of the evidence was "plausible in light of the record viewed in its entirety." This appellate fact-finding in the face of a substantial evidentiary basis for the District

Court's detailed and particularized factual findings and credibility choices was error.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *THORNBURG v. GINGLES* AND THE PLAIN LANGUAGE OF § 2 BY REJECTING PETITIONERS' CLAIM THAT BLACK AND WHITE VOTERS PREFER DIFFERENT CANDIDATES FOR REASONS OTHER THAN RACE OR PARTISAN POLITICS

By its terms, § 2 prohibits only those laws that "result[] in a denial or abridgment of the right of any citizen of the United States to vote *on account of race or color*," and directs courts to examine "the totality of circumstances" in determining whether a law violates the statute. 42 U.S.C. § 1973 (emphasis added). In evaluating the totality of circumstances, a court may consider, as five Justices recognized in *Gingles*, the reasons that blacks and whites prefer different candidates.

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

478 U.S. at 100 (O'Connor, J., joined by Burger, C.J., and Powell and Rehnquist, JJ., concurring in the judgment); *see also id.* at 83 (White, J., concurring) (arguing that no § 2 violation occurs when black-preferred candidates lose as a result of "interest-group politics").

In *LULAC*, the Fifth Circuit held that a § 2 claim must fail "[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens." 999 F.2d at 850. The Court explained:

> The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters "on account of race or color." ***Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any distinction between deprivation and mere losses at the polls becomes untenable.***

Id. (emphasis added).

Other circuits have likewise concluded that defendants in a § 2 case may properly introduce evidence of nonracial factors to explain seemingly polarized election results. For example, in *Nipper*, the Eleventh Circuit held that "if the evidence shows, under the totality of the circumstances, that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made." 39 F.3d at 1515. "And, '[i]f the defendant can affirmatively prove, under the totality of the circumstances, that racial bias does not play a major role in

the political community, and the plaintiff cannot overcome that proof, then obviously [Congress] did not intend the plaintiff to win, *even if the plaintiff has proven bloc voting.*'" *Id.* at 1524 n.60 (emphasis in original) (citation omitted).

The First Circuit has adopted a similar vote dilution standard by which a defendant may present evidence, as part of the totality of circumstances, that factors other than racial bias may have caused voting patterns. *Uno*, 72 F.3d at 980. In *Uno*, the First Circuit reasoned:

> [W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics (say, failure to support popular programmatic initiatives, or failure to reflect the majority's ideological viewpoints, or failure to appreciate the popularity of an incumbent). Section 2 does not bridge that gap -- nor should it. We believe it follows that, after *De Grandy*, plaintiffs cannot prevail on a [Voting Rights Act] § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to racial animus.

Id. at 981.

The District Court in this case, in accordance with the language of § 2, the views of five Justices in *Gingles*, and decisions in several circuits, examined Petitioners' nonracial explanations for voting patterns in the County. The court found these explanations persuasive, and that

"[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County," C.A. No. 1:91CV209-D-D, slip op. at 17 (App. 50), or elsewhere for that matter, be they black or white.

The Court of Appeals recognized that the "ultimate inquiry of Section 2 is racial discrimination," 92 F.3d at 295 (App. 84), and that a § 2 defendant may try to rebut the plaintiffs' vote dilution claim through evidence of "'objective, nonracial factors under the totality of the circumstances standard,'" *id.* at 292 (App. 76) (quoting *Nipper*, 39 F.3d at 1513); *see also id.* at 295 (App. 84) (§ 2 defendant can "offer evidence of the nonracial reasons for the voting patterns" of blacks and whites). But the Fifth Circuit then distinguished *LULAC* on the grounds that it "concerned a different problem -- the role of partisan politics." *Id.* at 295 (App. 84). In doing so, the Fifth Circuit effectively -- and erroneously -- confined Petitioners' proof of nonracial explanations to evidence that voters choose candidates based on partisanship, not race.

Neither § 2 nor this Court's decisions limit Petitioners' proof in this manner. To the contrary, the language of § 2 contains nothing that would confine defendants' nonracial explanations for voting patterns to differences in party affiliation. As discussed above, the statutory language bars laws that "result[]" in vote dilution "on account of race," and directs courts to examine the "totality of circumstances" in determining whether plaintiffs have proven a violation of the statute. Moreover, *Gingles* requires "'a searching practical evaluation of the "past and present reality"'" in determining whether § 2 has been violated. 478 U.S. at 79 (citation omitted). Defendants should therefore be permitted to offer any

evidence that tends to show that voters do not choose candidates "on account of race."

By limiting the District Court's inquiry into the circumstances underlying election results and voting patterns to "partisan politics" and no other nonracial explanations, the Court of Appeals failed to examine the "totality of circumstances" and ignored a key aspect of "'present reality'" in Attala County. The Court of Appeals thus destroyed any distinction between prohibited deprivation, denial or abridgment "on account of" race, and mere losses at the polls for nonracial reasons unrelated to partisan politics. For this reason as well, the Court of Appeals committed reversible error.[8]

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[8]Contrary to the Court of Appeals' criticism, 92 F.3d at 290-92 (App. 72-76), the District Court properly allocated the burden of proof with regard to nonracial explanations for voting patterns. Respondents in this case had the initial burden of presenting evidence of the *Gingles* preconditions. *See Nipper*, 39 F.3d at 1524. After Respondents did so, the burden shifted to Petitioners to offer evidence of nonracial explanations for the differences in black and white voting patterns. *Id.* Here, Petitioners offered such evidence, and the District Court found it persuasive. Although Respondents had no obligation to disprove such evidence as part of their initial burden of proof, *id.* at 1525 & n.64, once Petitioners offered such evidence, Respondents' failure to rebut it properly led the District Court to rule for Petitioners. *Id.* at 1524 n.60.

Such burden-shifting and allocation of the burden of proof is well-established in race discrimination claims generally. *See, e.g., McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Under the *McDonnell-Douglas/Burdine* framework for allocation of the burden of proof in employment discrimination claims, for example, if a plaintiff makes a prima facie case of a discriminatory discharge, then the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."

(Footnote continued)

CONCLUSION

This Court should grant certiorari because the Court of Appeals' decision ignores the language of § 2 and this Court's decisions in *De Grandy* and *Gingles*, and conflicts with the decisions of other circuits. For all of these reasons, and on the basis of the authorities cited, a Writ of Certiorari should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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(Footnote continued)

McDonnell-Douglas, 411 U.S. at 802. The plaintiff is then required to show that the defendant's proffered reason for the discharge is pretextual. *Burdine*, 450 U.S. at 256. Throughout, the plaintiff retains the ultimate burden of persuasion. *Id.* at 253; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). The same burden-shifting analysis applies here.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BERNARD TEAGUE, et alia,

plaintiffs,

v. **Civ. Act. No. EC 91-209-D-D**

ATTALA COUNTY, MISSISSIPPI, et alia,

defendants

MEMORANDUM OPINION

I. Introduction

In the instant case, the plaintiffs attack the 1983 supervisory and justice court judge redistricting plans for Attala County, Mississippi as diminishing minority voting power. The plaintiffs seek declaratory and injunctive relief for the following alleged statutory and constitutional violations: § 2 of the 1965 Voting Rights Act, as amended, codified under 42 U.S.C. § 1973, et seq., and the one person one vote principle ensconced in the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution.[1] Disposition of the above-captioned matter ensues from a hearing before the undersigned United States District Judge, sitting without a jury, on September 21, 1992, in Aberdeen, Mississippi. After considering the parties' submissions, the oral and documentary proof received at trial, together with the parties' proposed findings of fact and conclusions of law, and the record as a whole, the court finds plaintiffs' claims are unsupported. The 1983 redistricting plan, presently operating in Attala County is in harmony both with § 2 of the Voting Rights Act and the U.S. Constitution.

Set out below are the court's factual findings and legal conclusions.[2]

II. Findings of Fact

A. The Demographics

According to the 1980 Census, Attala County, Mississippi had a total population of 19,865; blacks accounted for 7,775 or 39.13% of the figure; of the remaining 12,090 or 60.86%, 12,052 or 60.7% were white. In 1990 Census data, Attala County is shown as having a total population of 18,481; blacks represent 7,299 or 39.5% of the county's total population. While the overall population of the county declined, the percentage of blacks increased by nearly one half percent.[3]

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[1]Implicit in these assertions of federal constitutional and statutory violations is the applicability of 42 U.S.C. § 1983.

[2]The court determines the following findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

[3]The black population of Attala County, according to the 1990 Census, rose by .4%.

As do other counties in Mississippi, Attala County elects its county board of supervisors, board of election commissioners, justice court judges, constables, and other public officials from five separate and distinct supervisory districts of nearly the same size in population. District lines are drawn according to the county's plan of redistricting, and should comport with the U. S. Constitution's "one person one vote" requirement. The current districting outline for the county's board of supervisors was adopted in 1983 when Attala County last reapportioned. In accordance with § 5 of the Voting Rights Act, the 1983 plan was submitted to the U.S. Department of Justice for preclearance; preclearance was granted, December 23, 1983. Similarly, the county's present justice court redistricting plan was precleared, June 10, 1983. The racial breakdown of the existing operative plans is as follows:

SUPERVISORY DISTRICT PLAN

DIST.	TOTAL. POP.	BLACKS/(%)	WHITES/(%)	OTHER/(%)
1	4,049	1,384/34.2	2,655/65.6	10/.2
2	4,092	2,124/51.9	1,961/47.9	7/.2
3	3,934	673/17.1	3,248/82.6	13/.3
4	3,895	2,486/63.8	1,407/36.1	2/.1
5	3,895	1,108/28.4	2,781/71.4	6/.2
	19,865	7,775/39.1	12,052/60.7	38/.2

SUPERVISORY DISTRICT PLAN USING 1990 CENSUS DATA

DIST.	TOTAL. POP.	BLACKS/(%)	WHITES/(%)	OTHER/(%)
1	3,988	1,303/32.7	2,667/66.9	18/.4
2	3,857	1,913/49.6	1,943/50.2	1/.2
3	3,687	875/23.7	2,790/75.7	22/.3
4[4]	3,494	2,240/64.1	1,251/36.0	3/.1
5	3,455	968/28.0	2,463/71.3	24/.2
	18,481[5]	7,299/39.5	11,114/60.1	68/.3

Calculation of the population deviation percentage using the above 1990 figures produces a 14.4 % maximum deviation. The relevant computation formula may be expressed via the following equation.[6]

$$\frac{(\text{most pop. dist.} - \text{avg. pop.})}{\text{avg. pop.}} + \frac{(\text{avg. pop.} - \text{least pop. dist.})}{\text{avg. pop.}} = \%\ \text{dev.}$$

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[4]District 4 holds a 59.27% majority black voting age population upon application of 1990 census numbers to the present 1983 redistricting plan: $\frac{1,432\ (\text{blk. vt. age pop.})}{2,416\ (\text{tl. vt. age pop.})} = 59.27\%$

[5]The total voting age population of Attala County, according to the 1990 Census tally, is 13,435: Blacks account for 35.44%, while the figure for whites is 64.3%; .3% represents "other" remaining individuals.

[6]$\frac{(3988 - 3696)}{3696} + \frac{(3696 - 3455)}{3696}$

$\frac{292}{3696} + \frac{241}{3696}$

7.9% + 6.5% = 14.4 %

The 1990 Census map boundary delineations within Kosciusko, Mississippi, the county seat of Attala County, do not, however, match those actually in existence. When adjusted to reflect current, existing supervisor district boundary lines, the 1990 Census numbers result in a lower percentage deviation.

APPLYING 1990 CENSUS DATA TO 1983 SUPERVISORY DISTRICT PLAN USING DISTRICT BOUNDARIES CURRENTLY EXISTING

DIST.	TOTAL. POP.	BLACKS/(%)	WHITES (non-blacks) / %
1	3,898	1,345/34.5	2,553/65.5
2	3,898	2,059/52.8	1,839/47.2
3	3,983	874/22.0	3,109/78.1
4	3,623	2,348/64.8	1,275/35.2
5	3,620	1,024/28.3	2,596/71.7
	19,022	7,650/40.0	11,372/60.0

Calculation of the population deviation percentage using the above 1990 figures in conformance with present district boundaries yields a 9.5% maximum population deviation.[7]

INCORPORATION OF 1990 CENSUS STATISTICS INTO JUSTICE COURT JUDGE 1983 DISTRICT PLAN

DIST.	TOTAL V.A. POP.	BLACKS/ (%)	WHITES/ (%)	OTHER/(%)
East	6,701	2,276/ 34.0	4,409/ 65.8	16/ .2
West	6,733	2,485/ 36.9	4,231/ 62.8	17/ .3

DIST.	TOTAL POP.	BLACKS/ (%)	WHITES/ (%)	OTHER/(%)
East	9,115	3,406/37.4	5,673/62.2	36/.4
West	9,366	2,893/41.6	5,441/58.1	32/.3

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[7] $\frac{3,983 \text{ (dist. 3)} - 3,804 \text{ (the avg. dist. pop.)}}{3,804}$

$\frac{3,804 - 3,620 \text{ (dist. 5)}}{3,804}$

$\frac{179}{3,804} = 4.7\%$

$\frac{184}{+\ 3,804} = 4.8\%$

$\frac{363}{3,804} = 9.5\%$

Calculation of the population deviation percentage using the above 1990 figures results in a 2.71% maximum population deviation.[8]

B. Black Candidate Electoral Success

Neither side contests the success of blacks in political races for the following positions. Black candidates have sought and won election to the following offices in Attala County:

(1) Supervisor of District 4-Jesse J. Fleming (removed from office following conviction for fraud)[9]

(2) Election Commissioner, District 4- Virginia Clark (presently sitting)

(3) School Board Member, District 2- Aubrey M. Veasy (presently sitting)

(4) School Board Member, District 4- Randy Clark

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[8] $\frac{9{,}366 \text{ (west)} - 9{,}240 \text{ (the avg. dist. pop.)}}{9{,}240}$

$\frac{9{,}240 - 9{,}115 \text{ (east)}}{9{,}240}$

$\frac{126}{9{,}240} = 1.36\%$

$\frac{125}{9{,}240} = 1.35\%$

$+\frac{9{,}240}{9{,}240} = 2.71\%$

[9] During the course of this trial, Fleming testified to his trial and conviction in the Circuit Court of Mississippi for Attala County on fraud charges for using county funds to repair his tractor. An appeal of his conviction is pending.

(5) Alderman (At Large), Ethel, Mississippi-Melvin Hughes, Jr. (presently sitting)

(6) Alderman (Ward 2)- Kosciusko, Mississippi-Billy Coffee (presently sitting)

(7) Alderman (Ward 4), Kosciusko, Mississippi-H.L. Myrick (presently sitting)

(8) Alderman (At Large), Sallis, Mississippi-Antley Bentley (formerly seated)

(9) Alderman (At Large), Sallis, Mississippi-John Robey (presently sitting)

(10) Alderman (Ward 2)- Kosciusko, Mississippi-James Bayne (formerly seated)

In modern time, no black candidates ever have won election to public office in Attala County as justice court judge, constable, sheriff, circuit clerk, coroner, county attorney, or state senator, despite a number of efforts. In contrast, blacks have never sought the elective positions of either chancery clerk or tax assessor of Attala County.

BLACK CANDIDATE	OFFICE	DATE OF POLITICAL RACE
Mary Brooks Dodd	circuit clerk (county)	August 7, 1979
Doc Drummond	J.P.	August 8, 1967
	mayor of Kosciusko	May 13, 1969
	J.P.	August 3, 1975
H.L. Myrick	alderman, Kosciusko	November, 1977
	alderman, Ward 4, Kosciusko	May, 1981
Jerry C. Lewis	supt. education	August 2, 1971
Jesse Fleming	J.P.	August 3, 1975
	supervisor, Dist. 4	August 7, 1979

Willie Floyd George	sheriff (county) supervisor, dist. 1	August 7, 1979 Feb. 28, 1984
Charles Phillips	coroner & ranger	August 7, 1989 Feb. 28, 1984 August, 1987
James Roundtree	supervisor, dist. 1	August 7, 1987
Taft Hawthorn, Jr.	constable, dist. 1	August 7, 1987
Zachary Winter	constable, dist. 1	August 7, 1987
Mary McCarter	J.P. dist. 2	August 7, 1987
Bessie Hancock	J.P. dist. 3	August 7, 1987
James Bayne	alderman, ward 2 Kosciusko supervisor, dist. 2	November, 1977 and May, 1981 Feb. 28, 1984
Stan McKinney	alderman, ward 3, Kosciusko	May, 1981
Barbara Woodward	alderman at large Kosciusko	May, 1981
Lucious Patterson	supervisor, dist. 5	August 7, 1987
L.B. Winters	supervisor, dist. 2	August, 1987
Murphy Greer	state sen. dist. 19	August, 1987

C. Socio-Economic Trends And Conditions

Both sides offered considerable testimony regarding the level of status attained by Attala County blacks in such areas as education, housing and employment. While defendants emphasized the gains and improvements which blacks collectively experienced,

plaintiffs noted that, as a group, blacks continued to trail the levels of attainment for whites in every significant area.

1. Income

A comparison between the 1990 and 1980 Census figures for the mean black family income in Attala County indicates a 71% rise. Although the increase for Attala County whites, 53%, is less, the 1990 Census Attala County figure for white mean family income outpaces that for blacks by $9,949 or 42%. Expressed in a different fashion, the mean black family income in Attala County is only 58% of that for whites.[10]

A 21% rise in the number of black households in Attala County with an income level between $15,000 and $24,999 is also evident from Census data analysis;[11] the percentage of white households within this income bracket declined from 85.12 to 67.84%. Notwithstanding the decrease, the white household percentage, 67.84, exceeds the black household percentage, 32.16, by approximately 52.3%. Further gains by Attala County black residents are evident through a comparison of the 1980 and 1990 Census figures for households with an income level

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[10]$23,725 (mean family income-white) (1990 Census)
- 13,776 (mean family income-black) (1990 Census)
9,949

58.067% X $23,725 = $13,776

13,776[.4]
23,725 = 58.067%

[11]The 1980 Census lists, 214, as the number of black households in Attala County with an income level of $15,000-$24,000.00; the 1990 Census reports, 513, an increase of 299, or 21%; the number of white households in this category under 1990 data, 1,082, is down by 142, or 10%, from 1,224, the number in 1980 Census materials.

between $25,000-34,999.00. The number of black households in Attala County in this range increased by 144, from 45 to 189. Blacks accounted for 21.21% of total households classified within the $25,000-$34,999 income slot in the 1990 Census. While a strong indicator of the improved economic status of blacks, the percentage figure does not completely capture the monetary gains of blacks in Attala County. A more accurate reading of the rise in black earning power is reflected in the percentage share of black households in the total number of additional households within the $25,000-$34,000 segment: Attala County had a total increase of 505 households within the $25,000-$34,000 grouping; of these, 30% are categorized as black.

To appreciate the full significance of this jump, it is necessary to examine the rate of growth in the number of black Attala County households with an income level between $25,000-34,999, as compared with the rate for white households in this bracket. While both groups experienced an increase, the growth in the number of black households in this category increased at a more rapid rate than the white counterpart. The number of Attala County black households classified in the 1990 Census as having incomes of $25,000-34,999 is 4.2 times the number reported in 1980. The rate of growth for white households in this category was only half that amount: 2.1%. The greater rate of growth is consistent with the greater share in population; during the years following the 1980 Census, the percentage of blacks in Attala County grew, while the percentage of whites decreased. The enhanced black population percentage is consistent with the increased prosperity of Attala County's blacks.

a. Poverty Level

A comparison between 1990 and 1980 Census figures reveals a decline in the percentage of Attala County adult blacks who live beneath the poverty line; for blacks, the figure dropped from 51.9% in 1980 to 41.9% in 1990; in contrast, the percentage of whites rose from 11.3% to 14%. Even with the sharp decline, the percentage of Attala County adult blacks living underneath the poverty line remains greater than the percentage of whites: Forty-one percent of Attala County's black adult population lives below poverty level in contrast to 14% of the county's white adult population, according to 1990 Census data.

2. Education

The number of adult blacks, twenty-five years of age and older, with a high-school education increased from 25% to 38.72%; college enrollment rose, as well, from 16% to 40.79%. The percentage of college degrees conferred on blacks rose from 15.31% to 19.07% between the two Census reports.

3. Unemployment

While the unemployment rate among Attala County's whites rose from 5.7% to 7.1%, black employment figures improved; black unemployment dropped from 16% in 1980 to 12.9% in 1990.

III. Conclusions of Law

Original jurisdiction over the parties and subject matter of this case rests with this court pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1973. Attala County is a political subdivision covered by the Voting Rights Act.

A. The § 2 Claim

As with any complaint of a § 2 violation, the court preliminarily addresses whether plaintiffs meet the Supreme Court's pronouncement of a tripartite test in the case of Thornburg v. Gingles, 478 U.S. 30, 36-37, 106 S. Ct. 2752, 2759-2760, 92 L. Ed. 2d 25, 38 (1986). The three critical factors which plaintiffs must demonstrate to advance a § 2 claim are: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the minority is politically cohesive; and (3) "that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate." Gingles, 478 U.S. at 50-51, 106 S. Ct. 2752, 92 L.Ed.2d at 46-47. As an initial hurdle, plaintiffs must comply with the Court's pronouncement; failure to establish all three elements of the Gingles threshold analysis defeats a § 2 claim. Brewer v. Ham, 876 F.2d 448, 451 (5th Cir. 1989).

If plaintiffs fulfill the requisite preconditions, the court next considers and evaluates the "totality of the circumstances" to determine whether the challenged electoral system impedes the ability of minority voters to elect representatives of their choice. See 42 U.S.C. § 1973(b); Gingles, 478 U.S. at 79, 106 S. Ct. at 2781, 92 L.Ed.2d at 65. In conducting its "totality of the circumstances" evaluation, the court considers specific factors from the Senate Judiciary Committee report on the 1982 Amendments to the Voting Rights Act. The derivation of the factors is, in part, traceable to Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Gingles endorses the seven Zimmer factors, which 5th Circuit courts use to determine whether electoral procedures are

discriminatory. Gingles, 478 U.S. at 44, 106 S. Ct. 2752, 92 L.Ed. 2d at 42; Brewer, 876 F.2d at 451. The factors are:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that political process;
>
> (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder[s] their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that, in some instances, may carry probative value are:

(1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

(2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

Gingles, 478 U.S. at 44-45, 106 S. Ct. 2752, 92 L.Ed.2d at 43; Brewer, 876 F.2d at 451.

Court review of the above factors is, by nature, a factual inquiry. Gunn v. Chickasaw County, Mississippi, 705 F. Supp. 315, 318 (N.D. Miss. 1989). Collectively, the components provide a framework for the court to consider the evidence in preparation for its application of the "totality of the circumstances" test set forth in § 2(b) of the Voting Rights Act. Inherently flexible, the test does not require "that any particular number of factors be proved, or that a majority of them point one way or the other." Gingles, 478 U.S. at 45, 106 S. Ct. 2752, 92 L.Ed.2d at 43. The all important question is whether "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] . . . in that

its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[12] Id.

Along with its flexibility, however, the test carries certain limitations. Gingles, 478 U.S. at 46, 106 S. Ct. at 2764, 92. L. Ed. at 43, 44.

> First, electoral devices, such as at-large elections, may not be considered per se violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

Id. (Citations omitted). Having outlined the pertinent standards controlling its decision, the court turns its attention to the three preconditions of a § 2 claim, otherwise known as the Gingles threshold test.

1. The Preliminary Inquiry

a. Minority Group Size and Geographic Compactness

Blacks in Attala County are sufficiently large in number and geographically compact to conceivably

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[12]While "[t]he extent to which members of [the] protected class have been elected to office in the state or political subdivision is one circumstance which may be considered[,]. . . nothing [in the Voting Rights Act] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

constitute two super majority single member supervisor districts. In contrast to the current plan, plaintiffs' proposed substitute plan places the entire black population of Kosciusko in one district. According to the testimony of Victoria Caridas, plaintiffs' expert witness, "Blacks inside Kosciusko alone could form a super majority district," leaving a sufficient concentration of blacks in the southwestern corner of the county to comprise a second majority black voting age population supervisor district. She further testified that blacks in Attala County are sufficiently numerous to create one majority black justice court judge district. After reviewing the voting age population data, the court finds that plaintiffs meet the first prong of the threshold test.

b. Racial Bloc Voting

The two remaining prerequisites are complementary aspects of racial block voting. Racial bloc voting "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes', or to put it differently, where 'black voters and white voters vote differently.'" Gingles, at 53, n.21, 106 S. Ct. at 2768, n.21, 92 L.Ed.2d at 48. Plaintiffs' and defendants' expert testimony on racial bloc voting patterns varies considerably. Plaintiffs' expert, Cheri McKinless, utilized two standard statistical methods which Gingles discussed: ecological regression and extreme case analysis. Through ecological regression analysis, McKinless examined the behavioral differences between whites and blacks in voting and turnout. To determine voter preference for either a black candidate or a white candidate, McKinless relied on extreme case analysis. This methodology essentially compares the strength of a black candidate's performance in heavily black precincts, with the amount of support received in predominantly white

precincts. In conducting her analysis, McKinless relied on precinct level election returns for racially mixed (white v. black) political contests between 1979 and 1991. Ideally, statisticians prefer homogenous precincts with a 90% voting age population for conducting extreme case analysis. The most heavily black precinct in Attala County, however, the Northeast precinct in District 2, has but a 71.81% black voting age population according to 1990 legislative precinct data. Due to the absence of any black precincts in Attala County with a suitable percentage, McKinless relied solely on precincts with at least an 80% white majority voting age population for her extreme case analysis tabulations. She testified that black candidates with white opponents received only marginal support in predominantly white precincts. In the thirteen elections sampled,[13] black candidates running against white opponents, on an average, garnished approximately 12% of the white votes cast in heavily white precincts of Attala County. The results of her extreme case analysis, plaintiffs' expert concluded, indicate a "strong association between race and voting." The court is unimpressed. Little value can be found in an extreme case analysis that does not consider two extremes; white precincts and black precincts. Without containing any heavily black precincts, plaintiffs' analysis is incomplete; it sheds no light on, and offers little proof of, black political cohesiveness. Nor does it hint of any preferred candidate of choice among blacks. Plaintiffs' analysis essentially presumes that the greater support for white candidates among whites voting in heavily white precincts is sufficient to demonstrate that whites vote as a

[13]Of noteworthy significance is the high amount of white voter support-- 59% -- which then incumbent black Judge Reuben Anderson received to defeat an avowed segregationist, Richard Barrett, in the racially charged Mississippi Supreme Court 1986 Democratic primary election.

bloc to defeat the preferred candidate of blacks. Such presumptions are unacceptable. It, by no means, is a forgone conclusion that blacks vote only for blacks in black vs. white elections. To presume that black voters are beholden to black candidates does the minority group an injustice and makes a travesty of the Voting Rights Act.

An equally unfair presumption is that only black candidates represent, share, and appeal to the concerns of the black electorate. Attala County black voters and, in fact, black voters in general, are capable of ousting or rejecting a black candidate in favor of a white candidate, whom they view as better meeting the needs of the people. Factors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County, or elsewhere for that matter, be they black or white. "Race won't keep you from getting elected, " as the supervisor of district three, Troy Hodges, related during trial. Hodges, whose district sits deep within the black area of Kosciusko, described his experiences of campaigning for votes and support from his black constituents, whom he described as crucial to his victory. When asked whether blacks "are single-minded," he responded, "No." It has been his experience that "blacks won't vote for a candidate just because [the candidate] is black or white."

Further evidence in the record reinforces this notion of black crossover voting. White candidates have received substantial support from voters in majority black precincts. For instance, in the September 27, 1991, first primary election, five candidates--four white and one black--were vying for sheriff. In the Sallis precinct of District Four, the presently existing black super majority district, there is a total black majority voting age population of 564 or 61.50%; the white voting population

is only 353 or 38.50%. Five hundred and eighty-five votes were cast for the four white candidates. Assuming that the entire 353 white voters supported white candidates (which is doubtful), this still leaves a minimum of 232 black crossover votes. Similarly, in the constable east district primary election of August 1987, the black candidate, Michael Lee, received 96 votes from the McCool precinct. If all 96 votes for Lee are attributed to blacks' the measurement of black voter turnout is 88.10%, a highly unlikely proposition, given blacks' historically low voter turnout. In fact, plaintiffs' own expert estimates a 12% level of black voting age population participation in this primary. Given the low percentage black turn out, the chances are highly probable that some of the 96 votes for Lee in the McCool precinct were cast by whites. Lack of black political cohesion, it seems, accounted for his loss, not white animosity. There is no indication that Lee's defeat was in any way due to a concentrated effort on the part of whites to solidify and exercise a bloc vote to thwart the election prospects of a black candidate, who, for that matter, did not even appear to have particularly strong minority support. With so little minority backing, Lee hardly could be called the candidate of choice among blacks. To suggest that blacks are driven solely by race and, therefore, committed to casting their votes for only black candidates, besides taking their vote for granted, is a misapplication of the Voting Rights Act. "Under § 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important." Gingles, 478 U.S. at 68, 106 S. Ct. 2752, 92 L.Ed.2d at 58. The Voting Rights Act never was intended as a vehicle for creating "safe" black or other minority seats. As is evident from the express statutory language, "[N]othing in this section establishes a right to have

members of a protected class elected in numbers equal to their proportion in population." 42 U.S.C. § 1973(b).

2. The Ultimate Inquiry

Although plaintiffs fail to meet the initial requirements of a § 2 claim, the court, nevertheless concludes that, even if they had been successful in the preliminary stage, in view of the "totality of the circumstances," blacks have the same "opportunity. . . to participate in the political process and . . . elect representatives of their choice." 42 U.S.C. § 1973. [T]he political processes leading to nomination or election in [Attala County] are . . . equally open to [black and white] participation . . . . " Id. This is evident from the number of black candidates ultimately elected to public office by black and white voters alike. Further evidence of black electoral involvement can be found in political contests between white candidates. Indeed, the black vote is heavily sought after in Attala County; election outcomes often turn on how blacks vote.

While black candidates have met with success, they have also experienced defeat. Some positions, they simply have never sought. Further redistricting of Attala County, however, is certainly no guarantee of additional black candidate victories. If, hypothetically, the court were to order implementation of a new voting scheme that "still fail[ed] to produce [more] black winner[s]," the court can easily envision entertaining even further requests to "mandat[e] [alternate] designs which segregate blacks into greater and greater concentrations until at last a black is elected[.]" Houston v. Haley, 859 F.2d 341, 343 (5th Cir. 1988). Adopting such a course would directly contravene the Voting Rights Act. The purpose of the Voting Rights Act was to eradicate impediments designed

to deny blacks (and other protected groups) the right to vote and participate in the political process. Plaintiffs equate the failure of a black candidate to emerge from a political contest as the winner with denying blacks effective political participation. Such contentions are an aberration of the legislative intent behind the Voting Rights Act. The landmark legislation sought to ensure political participation, not proportional representation. 42 U.S.C. § 1973; Houston, 859 F.2d at 343-344. Political participation, in the context of the Voting Rights Act, means equal access to the political process of launching a winning campaign and ultimately producing a successful candidate who represents "all citizens, not just a particular faction." Id. at 344. Congress foresaw a political process in which a variety of groups, through bargaining and negotiating, formulated strong power bases and built coalitions to maximize voter potential so that everyone's vote counted in the political arena.

Voter registration levels are comparatively the same for black and white Mississippians. According to Census Bureau information, 70.8% of whites and 71.4% of blacks in Mississippi were registered to vote in the 1990 Congressional election. The ecological regression analysis offered by plaintiffs as evidence of the difference between voting behaviors of blacks and whites is nondemonstrative of a minority vote dilution claim. The feeble explanations which plaintiffs offer for the lower voter turnout among blacks as compared with whites are unpersuasive. To say the improvements blacks have experienced over the last ten years are merely "adequate" severely underestimates the substantial ground traveled on the journey toward equality. The Census figures are a strong indication of the remarkable inroads blacks have made in areas where, historically, they had encountered discriminatory

treatment. At the very least, the numbers are encouraging. In virtually every aspect, the quality of life for blacks, as a segment of American society, continues on an upward trend.

As already demonstrated in Attala County, political office is no longer out of reach for blacks Americans. The parties stipulated in the pretrial order to the lack of a candidate slating process in Attala County. There is no evidence that campaign strategies in Attala County carry any degree of overt or subtle racial appeals. Rather than unequal electoral opportunity, the source of minority candidate defeat can be traced to the failure to energize an apathetic electorate. Voter apathy afflicts society in general, transgressing every socio-economic level and knowing no barriers. Political victories are the fruit of organizing, energizing and mobilizing an electorate to turn out and vote for a particular candidate. Rather than to the federal judiciary, plaintiffs should turn to the ballot box for increased political power. The recipe for greater political clout is "running candidates and turning out to vote." Salas v. Southwest Texas Junior College District, 964 F.2d 1542, 1555 (5th Cir. 1992).

B. Constitutional Claim

Similarly insubstantial is the constitutional claim which plaintiffs advance. The current district plans are nonviolative of the one person one vote principle underlying the U.S. Constitution. When Census data is incorporated to the existing supervisory plan using the actual boundaries currently in place, the population deviation, 9.54%, is minor; since it falls within the permissible margin--below the ten percent threshold--the maximum population deviation of the 1983 redistricting plan for Attala County comes under the "category of

minor deviations." Brown, 462 U.S. at 842, 103 S. Ct. 2690, 77 L.Ed.2d at 222 (citations omitted). "Minor deviations from mathematical equality . . . are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment . . . ." Brown v. Thomson, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L.Ed.2d 214, 221 (1983) (quoting Gaffney v. Cummings, 412 U.S. 735, 745-748, 37 L.Ed.2d 298, 93 S. Ct. 2321 (1973), which describes various difficulties in population measurements). De Minimis deviations are unavoidable, permissible, and necessary to keep political subdivisions functional. Brown, at 842, 103 S. Ct. 2690, 77 L.Ed. 2d at 221. "[M]aintaining the integrity of various political subdivisions" is a legitimate objective of state government. Brown, 462 U.S. at 842, 103 S. Ct. 2690, 77 L.Ed.2d at 221. Avoiding disruption of the precinct structure shaping Attala County's supervisory districts is one such legitimate state concern; one which plaintiffs' expert, Victoria Caridas, admittedly disregarded in drawing proposed "model" districts to replace the 1983 plan presently in place. Even if the deviation amounted to, as plaintiffs assert, a figure of 14%, the current plan is constitutionally valid, given defendants' legitimate concerns regarding the county's precincts. See Jenkins v. Pensacola, 638 F.2d 1249, 1255 (5th Cir. 1981) (14% deviation constitutionally permissible to avoid "undue distortion of precinct lines and contiguity").

The preservation of existing road mileage formulas to facilitate distribution of county funds under the current beat system of local county government was also recognized by Caridas as a valid state objective; however, it, too, was not considered in her "model" district formulations. Supervisors derive spending autonomy from a beat system of government, under which county funds

go directly to individual supervisors. In contrast to the beat system, the unit system of government requires supervisors to contend with a central authority. As the former supervisor of the county's black majority district, Jesse Fleming, testified that individual control over funding allotments allows supervisors to better serve their respective constituencies. Attala County voted in favor of the beat system over the unit system in 1988, with substantial support coming from Fleming's district.

I. Conclusion

In considering the record before it, the court finds that plaintiffs have not shown blacks in Attala County to be politically cohesive; nor have they proved that whites vote as a bloc to defeat minority candidates. Even assuming the inverse, the court concludes that neither of plaintiffs' claims is viable. The current district plans neither dilute black voting strength nor deny blacks equal access to the political process in violation of § 2 of the Voting Rights Act. Besides lacking a vote dilution claim, plaintiffs' action is devoid of a viable "one person one vote" constitutional claim.

An order in accordance with this memorandum opinion shall be entered.

This 9th day of December, 1992.

/s/ Glen H. Davidson
United States District Court Judge

Bernard TEAGUE, Leroy Gladney
and L.B. Winters, Plaintiffs - Appellants,

v.

ATTALA COUNTY, MISSISSIPPI,
et al., Defendants-Appellees.

No. 93-7001.

United States Court of Appeals,
Fifth Circuit.

April 1, 1994.

Appeal from the United States District Court for the Northern District of Mississippi.

Before POLITZ, Chief Judge, JONES, Circuit Judge, and FULLAM,* District Judge.

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*District Judge of the Eastern District of Pennsylvania, sitting by designation.

PER CURIAM:

In this Section 2 voting rights case and one person-one vote case, the district court found that appellants failed to carry their burden of proof 807 F.Supp. 392. Although we are persuaded that the court did not clearly err in rejecting the one person-one vote claim,[1] the court's findings in regard to the vote dilution claim were incomplete. Consequently, to this extent, we vacate and remand for further consideration.

Appellants contended that the single-member redistricting plan for Attala County's five supervisors, five election commissioners, and two justice court judges diluted the influence of the county's 40% black voting age population in violation of Section 2 of the Voting Rights Act and under-weighted votes contrary to the fourteenth amendment. As a result, no black citizen has been elected to county-wide office in modern times. Blacks have been elected as county supervisor or county election commissioner from a majority-black district only as a result of the favorable 1980 redistricting. When the county attempted to redistrict after the 1990 census, it rejected the U.S. Justice Department's insistence that its redistricting include two rather than one majority-black district. Instead, Attala County chose simply to use existing districts.

At trial, appellants used statistical evidence to prove their case. They attempted to show that in white-majority precincts (80% plus white), during eight elections between white and black candidates, an average of only 12% of the white voters voted for the black candidates. White voters in these precincts never gave support to a black candidate in a contested election for

[1]No more need be said about the equal protection claim.

county office. In addition to this "extreme case analysis", they offered evidence of racial polarization in the form of an ecological regression analysis. The regression analysis considered eight elections that pitted black against white candidates. In the majority-white district analyzed, appellants' experts contended that 87% of black voters supported black candidates while only 15% of white voters did so. This statistical evidence, together with the relative lack of black candidate success in Attala County, formed the core of appellants' case.

Both parties offered considerable additional evidence in contesting the two disputed *Gingles* issues: whether the minority group is politically cohesive, and whether the white majority vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2759-60, 92 L.Ed.2d 25 (1986).[2] The Supreme Court has held the *Gingles* factors equally applicable to challenges to single-member districts as to multi-member districts. *Growe v. Emison*, 507 U.S. _____, _____, 113 S. Ct. 1075, 1084, 122 L.Ed.2d 388 (1993); *Voinovich v. Quilter*, 507 U.S. _____, _____, 113 S. Ct. 1149, 1157, 122 L.Ed.2d 500 (1993). In *Voinovich*, the Court explained the dynamics of vote dilution as applied to minority vote "fragmentation" or "packing":

> In the context of a single-member districts, the usual device for diluting minority voting power is the manipulation of district lines. A politically cohesive minority group that is large enough to constitute the majority in a

[2]The first *Gingles* standard, that the minority is sufficiently large and compact to constitute a majority in a single member district, is not disputed. *Gingles*, 478 U.S. at 56, 106 S. Ct. at 2769.

> single-member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority. Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory. . . . How such concentration or "packing" [of minority voters within a district] may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates.

The district court, in rejecting appellants' contentions, held that appellants did not prove racial polarization in voting, and it noted that their "extreme case analysis" only included 80%-plus white precincts and therefore demonstrated only *white* cohesion. In a later part of the opinion, he summarily dismissed appellants' regression analysis as "non-demonstrative." In the alternative, the court found that even if voting in Attala

County was racially polarized, in the totality of circumstances, blacks still have equal opportunity to elect representatives of their choice. The court cited black candidates' successes in majority-black districts and gradual improvements in the economic condition of black residents, blaming any black electoral failures on voter apathy.

The district court is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists. *Magnolia Bar Association, Inc. v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993) ("the plaintiffs have not offered any authority, and we can find none, for their assertion that the district court may only rely on expert conclusions in determining whether white bloc voting is legally significant or whether elections in which whites do not vote as a bloc are an aberration.") But in making its intensely fact-specific inquiry here, the district court ought to have discussed appellants' statistical evidence more thoroughly because that was the principal evidence they offered and because their statistics had at least surface plausibility. Further, the district court findings on the subjects of racial polarization and minority political cohesion are broad and general and not explicitly tied to the testimony, although many witnesses were called in the case.

This court is unable to discharge our appellate function in voting rights cases without more guidance by the trial court concerning its credibility choices on the welter of evidence before it. *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989); *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020-21 (5th Cir. 1984) (court must discuss all the substantial evidence contrary to its opinion). Consequently, we must reverse and remand to obtain

revised findings of fact and conclusions of law that will directly evaluate appellants' statistical evidence and will more comprehensively refer to the other evidence in the record, tying that evidence directly to the *Gingles* preconditions in light of *Growe* and *Voinovich*. In so doing, of course, we do not intimate any view on the merits of the court's credibility choices or its ultimate conclusion.

For the foregoing reasons, the district court's judgment is VACATED and REMANDED in regard to the Section 2 Voting Rights Act claim; it is AFFIRMED in regard to the fourteenth amendment claim for redistricting based on the one person-one vote principle.

AFFIRMED in part, VACATED and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BERNARD TEAGUE, ET AL.

Plaintiffs

v. Civil Action No. 1:91CV209-D-D

ATTALA COUNTY, MISSISSIPPI, ET AL.

Defendants

MEMORANDUM OPINION

This case presents a challenge to the voting redistricting plan adopted by the Board of Supervisors of Attala County, Mississippi, used to elect five supervisors and five election commissioners from five single member districts and the justice court redistricting plan used to elect two justice court judges and two constables from two single member districts. On December 9, 1992, the undersigned held that the plan presently operating in Attala County was in harmony both with § 2 of the Voting Rights Act and the equal protection clause of the U.S. Constitution. Teague v. Attala County, Mississippi, et al., 807 F.Supp. 392 (N.D. Miss. 1992) ("Teague I").

United States Court of Appeals, Fifth Circuit, affirmed in part, and vacated and remanded in part. Teague v. Attala County, Mississippi, et al., 17 F.3d 796 (5th Cir. 1994) ("Teague II") The Fifth Circuit affirmed the district court's rejection of the one person-one vote claim under the equal protection clause of the United States Constitution, but held that this court's findings in regard to the vote dilution claim were incomplete. Id. at 796-97. Consequently, the decision on the § 2 claim was vacated and remanded for further consideration with specific instructions to discuss plaintiffs' statistical evidence more thoroughly and to more comprehensively refer to the other evidence in the record, tying that evidence directly to the Gingles[1] preconditions in light of Growe[2] and Voinovich.[3] After a review of the record evidence in this case, including post-remand proffers and memorandum,[4] the court finds that the present plans in place in Attala County are not in violation of § 2 of the Voting Rights Act.

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[1]Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986).

[2]Growe v. Emison, 507 U.S. ____, 113 S. Ct. 1075, 122 L.Ed.2d 388 (1993).

[3]Voinovich v. Quilter, 507 U.S. ____, 113 S. Ct. 1149, 122 L.Ed.2d 500 (1993).

[4]Pursuant to Fifth Circuit precedent in Westwego Citizens for Better Government v. City of Westwego (Westwego), 906 F.2d 1042 (5th Cir. 1990), the court set a post-remand briefing schedule to receive proof relative to elections held post-trial. By Order dated September 12, 1994, the court allowed intervention to allow the United States of America to participate in the remand proceedings. The court has now received all the appropriate submissions and stands ready to rule.

FINDINGS OF FACT

A. DEMOGRAPHICS

As previously found in Teague I, in 1990 Census data, Attala County is shown as having a total population of 18,481; blacks represent 7,299 or 39.5% of the county's total population. As do many counties in Mississippi, Attala County elects its county board of supervisors and board election commissioners from five separate and distinct supervisory districts of nearly the same population. District lines are drawn according to county's plan of redistricting, and should comport with the U.S. Constitution's "one person one vote" requirement. The current districting outline for the county's board of supervisors was adopted in 1983 when Attala County last reapportioned. In accordance with § 5 of the Voting Rights Act, the 1983 plan was submitted to the U.S. Department of Justice for preclearance; preclearance was granted, December 23, 1983. Similarly, the county's present justice court redistricting plan was precleared, June 10, 1983. The racial breakdown of the existing operative plans is as follows:[5]

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[5]The figures found in the tables below were taken from this court's Teague I opinion.

SUPERVISORY DISTRICT PLAN

DIST.	TOTAL. POP.	BLACKS/(%)	WHITES/(%)	OTHER/(%)
1	4,049	1,384/34.2	2,655/65.6	10/.2
2	4,092	2,124/51.9	1,961/47.9	7/.2
3	3,934	673/17.1	3,248/82.6	13/.3
4	3,895	2,486/63.8	1,407/36.1	2/.1
5	3,895	1,108/28.4	2,781/71.4	6/.2
	19,865	7,775/39.1	12,052/60.7	38/.2

SUPERVISORY DISTRICT PLAN USING 1990 CENSUS DATA

DIST.	TOTAL. POP.	BLACKS/(%)	WHITES/(%)	OTHER/(%)
1	3,988	1,303/32.7	2,667/66.9	18/.4
2	3,857	1,913/49.6	1,943/50.2	1/.2
3	3,687	875/23.7	2,790/75.7	22/.3
4[6]	3,494	2,240/64.1	1,251/36.0	3/.1
5	3,455	968/28.0	2,463/71.3	24/.2
	18,481[7]	7,299/39.5	11,114/60.1	68/.3

---

[6]District 4 holds a 59.27% majority black voting age population upon application of 1990 census numbers to the present 1983 redistricting plan: 1,432 (blk. vt. age pop.)
2,416 (tl. vt. age pop.) = 59.27%

[7]The total voting age population of Attala County, according to the 1990 Census tally, is 13,435: Blacks account for 35.44%, while the figure for whites is 64.3%; .3% represents "other" remaining individuals.

Calculation of the population deviation percentage using the above 1990 figures produces a 14.4 % maximum deviation. The relevant computation formula may be expressed via the following equation:[8]

$$\frac{\text{(mos pop. dist.-avg. pop.)}}{\text{avg. pop.}} + \frac{\text{(avg. pop.- least pop. dist.)}}{\text{avg. pop.}} = \%\ \text{dev.}$$

The 1990 Census map boundary delineations within Kosciusko, Mississippi, the county seat of Attala County, do not, however, match those actually in existence. When adjusted to reflect supervisor district boundary lines on December 9, 1992, the 1990 Census numbers result in a lower percentage deviation.

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[8] $\frac{(3988 - 3696)}{3696} + \frac{(3696 - 3455)}{3696}$

$\frac{292}{3696} + \frac{241}{3696}$

7.9% + 6.5% = 14.4 %

APPLYING 1990 CENSUS DATA TO 1983 SUPERVISORY DISTRICT PLAN USING DISTRICT BOUNDARIES CURRENTLY EXISTING

DIST.	TOTAL. POP.	BLACKS/(%)	WHITES (non-blacks) /(%)
1	3,898	1,345/ 34.5	2,553/ 65.5
2	3,898	2,059/ 52.8	1,839/ 47.2
3	3,983	874/ 22.0	3,109/ 78.1
4	3,623	2,348/ 64.8	1,275/35.2
5	3,620	1,024/ 28.3	2,596/71.7
	19,022	7,650/ 40.0	11,372/ 60.0

Calculation of the population deviation percentage using the above 1990 figures in conformance with district boundaries in December of 1992 yields a 9.5% maximum population deviation.[9]

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[9] $\frac{3,983 \text{ (dist. 3)} - 3,804 \text{ (the avg. dist. pop.)}}{3,804}$

$\frac{3,804 - 3,620 \text{ (dist. 5)}}{3,804}$

$\frac{179}{3,804} = 4.7\%$

$\frac{184}{+\ 3,804} = 4.8\%$

$\frac{363}{3,804} = 9.5\%$

INCORPORATION OF 1990 CENSUS STATISTICS INTO JUSTICE COURT JUDGE 1983 DISTRICT PLAN

DIST.	TOTAL V.A. POP.	BLACKS/ (%)	WHITES/ (%)	OTHER/(%)
East	6,701	2,276/ 34.0	4,409/ 65.8	16/ .2
West	6,733	2,485/ 36.9	4,231/ 62.8	17/ .3

DIST.	TOTAL POP.	BLACKS/ (%)	WHITES/ (%)	OTHER/(%)
East	9,115	3,406/37.4	5,673/62.2	36/.4
West	9,366	2,893/41.6	5,441/58.1	32/.3

Calculation of the population deviation percentage using the above 1990 figures results in a 2.71% maximum population deviation.[10]

B. BLACK CANDIDATE ELECTORAL SUCCESS

As previously found, no black candidates ever have won election to public office in Attala County as justice court judge, constable, sheriff, circuit clerk, coroner,

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[10] $\frac{9,366 \text{ (west)} - 9,240 \text{ (the avg. dist. pop.)}}{9,240}$

$\frac{9,240 - 9,115 \text{ (east)}}{9,240}$

$\frac{126}{9,240} = 1.36\%$

$+ \frac{125}{9,240} = 1.35\%$

$\frac{251}{9,240} = 2.71\%$

county attorney, or state senator, during modern times.[11] The court requested parties to present submissions in regard to post-trial events. No black candidate was elected to any of the above positions post-trial until present. Indeed, no black candidate has ever won a contested election for a county office in a majority-white election district. Blacks have been elected as county supervisor or county election commissioner only from majority-black districts. Trial Tr. 93, 158, 401; Ex. D-3.

C. SOCIO-ECONOMIC TRENDS AND CONDITIONS

This court discussed the level of status attained by Attala County blacks in income, education, housing and employment in detail in Teague I. Teague I, 807 F.Supp. at 399-400. A repeat discussion is not necessary. Suffice it to say, although blacks continue to trial the levels of attainment for whites in the significant categories named above, blacks have experienced meaningful gains and improvements. See Id. The court will elaborate on these issues where necessary below.

CONCLUSIONS OF LAW

In Thornburgh v. Gingles, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764-65, 92 L.Ed.2d 25 (1986), the Supreme Court held that "the essence of a § 2 claim is that certain electoral law, practice, or structure, interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Urging a flexible, fact-intensive examination and a searching practical evaluation of the "past and present reality," the Court

[11]The court provided an exhaustive list of pertinent races and candidates in Teague I. Teague I, 807 F.Supp. at 398-99. Providing another list here is not necessary.

established three baseline requirements for proof of a § 2 violation. Gingles, 478 U.S. at 46, 50-51, 106 S. Ct. 2764, 2766-67.

The three critical factors are: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; (2) that the minority is politically cohesive; and (3) "that the white majority votes sufficiently as a bloc to enable it in the absence of special circumstances, such as minority candidate running unopposed--usually to defeat the minority's preferred candidate." Id. 478 U.S. at 50-51, 106 S. Ct. at 2766. Failure to establish all three elements of the Gingles threshold analysis defeats a § 2 claim. In the present case, the first factor is not disputed. However, as to the two remaining Gingles issues, -- whether the minority group is politically cohesive, and whether the white majority vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate, the Fifth Circuit has requested a more thorough finding. In Teague I, the undersigned held that the plaintiffs had not established the last two Gingles requirements.

If plaintiffs fulfill the requisite preconditions (2) and (3) above, the court then must look at the "totality of the circumstances" to determine whether the challenged electoral system impedes the ability of minority voters to elect representatives of their choice. See 42 U.S.C. § s 1973(b); Gingles, 478 U.S. at 79, 106 S. Ct. at 2781. In conducting its "totality of the circumstances" evaluation, the court considers specific factors from the Senate Judiciary Committee report on the 1982 amendments of the Voting Rights Act. The derivation of the factors is, in part, traceable to Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Gingles endorses the seven Zimmer factors which 5th Circuit courts use to

determine whether electoral procedures are discriminatory. Gingles, 478 U.S. at 44, 106 S. Ct. 2752. The factors are:

> (1) the extent of any history of official discrimination in the sate or political-subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that political process;
>
> (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder[s] their ability to participate effectively in the political process;
>
> (6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that, in some instances, may carry probative value are:

(1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

(2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

Gingles, 478 U.S. at 44-45, 106 S. Ct. 2752, 92 L. Ed. 2d at 43.

Court review of the above factors is, by nature, a factual inquiry. Gunn v. Chickasaw County, Mississippi, 705 F. Supp. 315, 318 (N.D. Miss. 1989). Collectively, the components provide a framework for the court to consider the evidence in preparation for its application of the "totality of the circumstances" test set forth in § 2(b) of the Voting Rights Act. Inherently flexible, the test does not require "that any particular number of factors be proved, or that a majority of them point one way or the other." Gingles, 478 U.S. at 45, 106 S. Ct. 2752. The all important question is whether "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate

to participate in the political process and to elect representatives of their choice."[12] Id.

Along with its flexibility, however, the test carries certain limitations. Gingles, at 46, 106 S. Ct. at 2764, 92. L.Ed. at 43,

> First, electoral devices, such as at-large elections, may not be considered per se violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

Id. (Citations omitted). In Teague I the court found that, even assuming that the Gingles factors had been met, plaintiffs' § 2 claim failed under the "totality of the circumstances" standard. Although not holding that the "totality" analysis was clear error, the Fifth Circuit requested a more thorough review of the plaintiffs' evidence.

Pursuant to the Fifth Circuit's instruction in Teague II, the court will limit its discussion here to the issue of racial polarization (i.e. minority political cohesion

[12]While "[t]he extent to which members of [the] protected class have been elected to office the State or political subdivision is one circumstance which may be considered[,] . . . nothing [in the Voting Rights Act] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C.-s 1973(b).

and white bloc voting), with particular emphasis on the statistical evidence submitted by plaintiffs. The court will then proceed to the "totality of the circumstances" component of a § 2 analysis.

1) RACIAL BLOC VOTING

The second and third Gingles requirements, political cohesion and white bloc voting, focus on the existence of racially polarized voting. An examination of racial bloc voting can ascertain whether or not minority voters are politically cohesive, as well as determining whether or not white bloc voting is solid enough to consistently defeat the minority's preferred choice. Racial bloc voting "exists where there is a 'consistent relationship between the race of the voter and the way in which the voter votes', or to put it differently, where 'black voters and white voters vote differently.'" Gingles, 478 U.S. at 53 n. 21, 106 S. Ct. at 2768 n. 21. The issue of whether polarized voting currently exists in Attala County was hotly contested by the parties, and the court has found this to be the most difficult issue in the case. Such difficulty is not surprising given the numerous unanswered questions surrounding the issue nationwide. As noted by the Court in Gingles, "there is no simple doctrinal test for the existence of legally significant racially polarized voting." Id. at 58, 106 S. Ct. at 2769.

At trial, expert testimony on racial bloc voting patterns varied considerably, although statistical evidence produced by both sides on the same was somewhat similar. Plaintiffs' experts utilized two standard statistical methods which Gingles recognizes and discusses: ecological regression and extreme case analysis. Ecological regression is the method for inferring the voting behavior of whites and blacks. This method brings together the precinct level data and indicates how voting and turnout correspond to

the proportions of whites and blacks in each precinct. Ex. P-1 at 2. Plaintiffs' expert at the original trial, Cheri McKinless, presented evidence from her ecological regression analysis of eight black-white elections.[13] Overall, her findings indicated that an average of 15% support is given to black candidates by white voters; whereas, 85% of the white voters chose white candidates. Id. at 3. The same summary chart indicated that on the average, black support for a black candidate was 87% compared to 13% support given to white candidates. Id. at 4. Dr. Richard L. Engstrom, plaintiffs' post-remand expert, examining the three black-white post-remand elections using ecological regression analysis, found that between 86.3% and 92.8% of black voters supported black candidates, while 12%-25.2% of white voters supported black candidates. Engstrom Declaration, Exhibit A submitted with Pls.' Post-Remand Evidentiary Proffer.[14] Dr. James W. Loewen, the expert utilized by the United States, when analyzing the same post-remand elections based on ecological regression, found that on average 89.5% of black voters supported black candidates, while 10.5% of white voters supported black candidates. Loewen Declaration at 11, Table 2. The summary also indicated

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[13]Table 1 of Ex. P-1 summarizes her findings. The eights elections examined were: 1) Primary 1987, Constable East; 2) Primary 1987, Coroner; 3) Primary 1987, Supervisor District 2; 4) Primary 1988, Presidential; 5) Special 11/1988, Supervisor; 6) 2nd 11/1988, Supervisor; 7) lst Primary 1991, Supervisor District 2; 8) 2nd Primary, Supervisor District 2.

[14]Engstrom analyzed the following elections: 1) March 1993 Primary, U.S. Congress; 2) April 1993 Runoff, U.S. Congress; 3) November 1993, District 2 Election Commissioner.

that on average 82.9% of white voters supported white candidates, while 17.1% supported black candidates.[15]

Dr. Ronald E. Weber, defendants' expert, utilized only the ecological regression analysis when examining elections in Attala County. His statistical findings were similar to the above findings of plaintiffs' experts, although his correlation coefficient was significantly lower. Because of the low correlation coefficient, Dr. Weber opined that the results from the ecological regression analysis were not reliable. As will be discussed below, Dr. Weber also disagreed vehemently with plaintiffs' experts on what the statistics actually prove in regard to racial polarization. Dr. Weber did not

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[15]As discussed in Dr. Loewen's Declaration:

> Regression analysis generates a correlation coefficient, r, which is a statistical measure of the closeness of the fit between the independent variable (here, the racial composition of the election precinct) and the dependent variable (here, the level of support for a particular candidate). A high correlation coefficient justifies confidence in the underlying data. A useful mathematic characteristic of the correlation coefficient is that its square, r^2, indicates the proportion of the variance in the dependent variable that is associated with the independent variable. In election analysis, for example, an r^2 of .93 tells us that 93% of the variation in the vote can be accounted for by the racial composition of the precinct. Loewen Declaration at 12.

Engstrom's regression analysis produced a correlation coefficient of .862 for the U.S. Congress 1993 March Primary race, .935 for the 1993 runoff, and .988 for the Election Commission, District 2, November 1992 election. The corresponding r^2's were .743, .874 and .976 respectively. Loewen's regression analysis produced similarly high correlation coefficients.

perform an extreme case analysis. He testified that, because there was no homogenous black precincts in Attala County where the proportion black VAP was 90% or higher, an extreme case analysis would be insufficient to indicate black political cohesion. He further testified that Attala County contained only two homogenous non-black precincts with 90% white VAP which would also limit the accuracy of estimating white bloc voting. Weber Declaration at 4.

Plaintiffs' experts, however, did analyze several elections using the extreme case analysis. This method essentially compares the strength of a black candidate's performance in heavily black precincts, with the amount of support received in predominately white precincts. Teague I, 807 F.Supp. at 402. At trial, McKinless relied on precinct level election results for racially mixed political contests between 1979 to 1991. As commented on earlier, experts prefer homogenous precincts with a 90% voting age population ("VAP") for conducting extreme case analysis. As the most heavily black precinct in Attala County, the Northeast precinct in District 2, only had 71.81% black voting age population, McKinless relied solely on precincts with at least 80% white majority VAP for her extreme case analysis. She testified that black candidates with white opponents received only marginal support in predominately white precincts. Specifically, in the thirteen elections sampled, black candidates running against white opponents, on an average garnished approximately 12% of the white votes cast in heavily white precincts. Id. at 402-03. Engstrom and Loewen also performed the extreme case analysis on the three post-remand elections and both opined that the extreme case analysis confirmed the results of the regression analysis. Engstrom Declaration at 3 and Exhibit B,

Loewen Declaration at 13. Plaintiffs' experts unanimously concluded that racial polarization, black political cohesion and white bloc voting, exists in Attala County and that black voters in Attala County do not have a reasonable opportunity to elect candidates of their choice in majority white districts. Engstrom Declaration at 4; Loewen Declaration at 4.

As discussed in Teague I, the court found little value in an extreme case analysis that did not consider two extremes: white precincts and black precincts. Without containing any heavily black precincts, there is little proof of black political cohesiveness when utilizing case analysis. Id. at 403. Plaintiffs do not dispute this conclusion, but they argue that, given the statistical evidence of racial polarization from the regression analysis and the strong indication of white bloc voting using the extreme case analysis, black political cohesion may be presumed. As found by this court in Teague I, this presumption is unacceptable.

Even though the court does not agree with plaintiffs as to the presumption of black political cohesion, there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County. However, such findings do not end the inquiry. In Teague I, the court discussed two elections where black crossover voting was evident. In the first, the 1991 First primary election for sheriff, the court evaluated the Sallis precinct of District 4, the presently existing super majority district, and found substantial black crossover voting which resulted in a white candidates victory. The second, the 1987 Constable east district election, the court found that lack of black political cohesion, not white animosity, accounted for a black candidates defeat. Although the court does not hold that the results in these two elections

alone disprove plaintiffs' case, the undersigned is of the opinion that these two elections provide compelling evidence that voters in Attala County are not driven by race.

The Fifth Circuit in League of United Latin American Citizens, Council, No. 4434 v. Clements, 999 F.2d 831, 850 (5th Cir. 1993) (en banc) , cert. denied, __ U. S. __, 114 S. Ct. 878, 127 L.Ed.2d 74 (1994) ("LULAC") , in reversing a district court decision, held that courts must consider evidence of nonracial causes of voting preferences in analyzing particular § 2 claims. The court found that, "[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens", a § 2 claim must fail. Id. As stated in LULAC:

> The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters "on account of race or color." Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any distinction between deprivation and mere losses at the polls becomes untenable. In holding that failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat. Id.

Statistical analyses do not encompass other factors and variables that provide further insight into voting behaviors and patterns. Houston v. Lafayette County, Miss., 841 F.Supp. 751, 764 (N.D. Miss. 1993). Statistics examine how, rather than why, people vote the way they do. Id. The court is of the opinion that factors other than race influence voters in Attala County, and therefore, plaintiff has failed to prove racial polarization. Factors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County. Teague I, 807 F.Supp. at 403. Conspicuously missing from the record in this cause is any proof to the contrary. Of the black-white elections analyzed, there is no proof in the record that in any way compares the candidates on any basis other than race.

The plaintiffs claim that a conclusion that factors other than race shape and determine election outcomes is contradicted by the fact that no black candidate for county office in Attala County has ever received a majority of the white vote or has been elected in a majority white election district. Pls.' Post-Remand Memorandum at 10. The court disagrees. The defendants presented several lay witnesses at trial that testified about factors other than race which determined political preference and election outcomes in Attala County. Significantly, Troy Hodges, supervisor in District 3 located deep within the black area of Kosciusko, testified that "Race won't keep you from being elected". When elaborating on his experiences in campaigning for the black vote, which he described as crucial to his victory, Hodges stated that it has been his experience that "blacks won't vote for a candidate just because [the candidate] is black or white." Teague I, 807 F.Supp. at 392. Kosciusko Alderman H. L. Myrick, who

is black, attributed his election to a strong white crossover vote, describing many instances in which white citizens helped in his political campaigns and gave him financial support. Tr. 558, 562-66. He testified that black and white citizens vote not on the basis of skin color, but on the basis of the candidate and his qualifications. Tr. 566.

In sum, the record contains testimony of established politicians in Attala County that support the defendants' claims that nonracial factors influence voters and determine election outcomes in Attala County. Significantly, the experiences and observations of individuals in the political process in Attala County strongly indicate a lack of black political cohesion and significant white and black crossover voting. Additionally, upon evaluating several elections, particularly in the 1991 Primary elections for sheriff and the 1987 Constable east district race analyzed in Teague I, the court finds that black and white crossover voting significantly impact election outcomes in Attala County. Although statistical evidence may weigh in favor of a finding of racial polarization, the court is of the opinion that this evidence alone is not sufficient. Plaintiffs have failed to establish black political cohesion in the present case and, more importantly, have failed to establish that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors, such as a candidate's experience, qualifications, education and contact with the electorate. As the plaintiffs have not established the racial polarization element of the Gingles threshold analysis, there claim under § 2 must fail.

2) TOTALITY OF THE CIRCUMSTANCES

To the extent that a successful demonstration of all three Gingles factors is necessary to prove a § 2 violation, there is no need to look any further. However, the court is compelled in this case to examine the "totality of the circumstances" component of a § 2 analysis. Assuming, arguendo, that plaintiffs were able to affirmatively show all three Gingles factors, the court would still find that Attala County's electoral system does not violate § 2. The court is of the opinion that blacks have the same "opportunity . . . to participate in the political process and . . . elect representatives of their choice." 42 U.S.C. § 1973. "[The political processes leading to nomination or election in [Attala County] are . . . equally open to [black and white] participation . . . . " Id.

As found in Johnson v. De Grandy, 512 U.S. __, 129 L.Ed.2d 775, 114 S. Ct. 2647 (1994), even though a plaintiffs may prove the existence of the Gingles factors, their claim may fail under the "totality of the circumstances". The district court is required to rest its ultimate conclusions about opportunity and access to the political process upon "comprehensive, not limited, canvassing of relevant facts." De Grandy, 129 L.Ed. 2d at 791. Factfinders cannot rest uncritically on assumptions about the force of the Gingles factors in pointing to vote dilution. Id. at 792. As previously found by the undersigned in Teague I, plaintiffs' claim must also fail under the "totality of the circumstances". The court below considers factors impacting the present case.

1. History of Discrimination

There can be no question of the long history of discrimination against blacks in Mississippi and Attala

County. The parties do not dispute this fact. However, the question before this court is whether vestiges of past discrimination or present discrimination interacts with present political structures to perpetuate a historical lack of access to the political system. Westwego Citizens for a Better Govt. v. City of Westwego, 872 F.2d 1201, 1211-1212 (5th Cir. 1989). A history of discrimination, without more, will not suffice to establish this factor. LULAC, 999 F.2d at 867. Here, plaintiffs argue that the record contains "more" with proof of reduced levels of black voter registration and lower turnout among black voters. As discussed in Teague I, the court is of the opinion that other factors, such as voter apathy, have resulted in reduced registration and turnout. Nothing in the record persuades this court that this finding was in error. Accordingly, the court holds that plaintiffs have failed to prove that past discrimination has a present impact on voting behavior in Attala County and, even if it does have an impact, such impact is no greater than the many other influences.

2. Socioeconomic Disparities

In Teague I, the court provided a thorough discussion of the socioeconomic disparities between blacks and whites in Attala County. Teague I, 807 F.Supp. at 399-400. There can be no question of the socioeconomic disparities between whites and blacks in Attala County. The dispute concerns whether these disparities have an impact on political opportunity. The court in LULAC addressed this issue in its discussion of the past history of discrimination. In LULAC, the court commented that "[p]laintiffs have offered no evidence of reduced levels of black voter registration, lower turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the

political process." LULAC, 999 F.2d at 867. Plaintiffs' expert testified that depressed political participation typically accompanies poverty and a lack of education, but the court held that, such testimony, "certainly does not amount to proof that minority voters in this case failed to participate equally in the political processes." Id.

In contrast, here plaintiffs have already proven and the court has found evidence of depressed black voter participation in Attala County. Plaintiffs contend that this proof is sufficient to presume a causal nexus between their disparate socioeconomic status and the depressed level of participation. See Id. at 867 ("where level of black participation in politics is depressed, plaintiffs need not prove any further causal connection between their disparate socio-economic status and depressed level of political participation"). However, in the present case, defendants have introduced proof that voter apathy explains the depressed level of participation. This court agrees. In Teague I, the court found:

> Rather than unequal opportunity, the source of minority candidate defeat can be traced to the failure to energize an apathetic electorate. Voter apathy afflicts society in general, transgressing every socio-economic level and knowing no barriers. Political victories are the fruit of organizing, energizing and mobilizing an electorate to turn out and vote for a particular candidate. Id. at 405.

This court determined that voter apathy influenced election results in Attala County. Voter registration levels are comparatively the same for black and white Mississippians. According to Census Bureau information,

70.8% of whites and 71.4% of blacks in Mississippi were registered to vote in the 1990 Congressional election. Defendant's trial expert, Art Whittemore, testified regarding sharp decline in voter participation and voter turnout by both blacks and whites from 1988-1990 and confirmed lower voter turnout among blacks and whites resulted from increased voter apathy statewide and nationally. Tr. 470-71.

The court is of the opinion that voter apathy, as well as past discrimination and socioeconomic disparities, have a significant impact on present day politics in Attala County. Therefore, these factors do not weigh in favor of either party under the "totality" analysis.

3. Racial Polarization

As discussed at length above, the court is of the opinion that factors other than race influence voters in Attala County.

4. The Extent to Which Blacks Have Been Elected to Office

Teague I listed ten instances where blacks were elected to offices in Attala County. Teague I, 807 F.Supp. at 398. No black candidates have ever been elected as County Supervisor in any of the majority-white districts. The record further reflects that no black candidate has been elected from a majority-white election district in a contested election.[16] Although this factor weighs in favor of plaintiffs, the court noted in Teague I that:

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[16]The record indicates that current Alderman (At Large) in Ethel, Mississippi, Melvin Hughes, Jr. and Alderman (At Large) in Sallis, Mississippi, John Robey and former Alderman (At Large) in Sallis, Mississippi, Autley Bentley won uncontested elections.

The remaining seven elections listed in Teague I were in majority-black election districts.

> The purpose of the Voting Rights Act was to eradicate impediments designed to deny blacks (and other protected groups) the right to vote and participate in the political process. Plaintiffs equate the failure of a black candidate to emerge from a political contest as the winner with denying blacks effective political participation. Id. at 404.

As discussed throughout this opinion, the undersigned is of the opinion that the plaintiffs in Attala County are simply not denied effective political participation.

5. Lack of Responsiveness

There is no evidence in the record that suggests lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. Indeed, established political veterans in the county, testified at trial of the necessity of support from black constituents. Politicians in the county commented on the importance of representing and appealing to the concerns of the black electorate, as well as the white electorate. Although the factor weighs in favor of defendants, the court recognizes its limited role in the "totality analysis. See Jones v. City of Lubbock, 727 F.2d 364, 382 (5th Cir. 1984) (noting diminished role of responsiveness).

6. Other factors

The evidence regarding the other factors does not weigh strongly in favor of either plaintiffs or defendants.

In summary, even if blacks were politically cohesive, and even if white bloc voting had resulted in the defeat of black candidates of choice, the court nevertheless finds that, in the "totality of the circumstances", blacks in

Attala County have the ability to participate in the political process and elect candidates of choice equal to that of others in the electorate. In so finding, the court recognizes that no one factor is outcome determinative; rather, the court looked to the record, taken as a whole, so as to provide an intensely local appraisal of blacks' ability to participate in the political process in light of past and present reality in Attala County. See NAACP, Inc. v. City of Columbia, South Carolina, et al., 850 F. Supp. 404, 430 (D.S.C. 1993) (court discussing the parameters of the "totality of the circumstances" analysis).

SUMMARY OF CONCLUSIONS

Based on the discussion above of the Gingles factors and the "totality of the circumstances", the court finds that plaintiffs have failed to prove that black citizens in Attala County have less opportunity than others in the electorate to participate in the political process and to elect candidates of their choice. The current plan neither dilutes black voting strength nor denies blacks equal access to the political process in violation of § 2 of the Voting Rights Act. Accordingly, the court holds that judgment should be entered in favor of the defendants.

An order in accordance with this opinion shall issue this 20th day of March, 1995.

/s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60204

BERNARD TEAGUE, ET AL.,

Plaintiffs Appellants,

UNITED STATES OF AMERICA,

Intervenor Plaintiff-
Appellant,

versus

ATTALA COUNTY, MISSISSIPPI, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Mississippi

Before LAY*, HIGGINBOTHAM, and STEWART,
Circuit Judges.
CARL E. STEWART, Circuit Judge:

*Circuit Judge of the Eighth Circuit, sitting by designation.

This is our second opportunity to consider the allegation that Attala County's districting plans for the election of county supervisors and county constables dilute minority voting strength.[1] Plaintiffs initially alleged violations of both § 2 of the 1965 Voting Rights Act, 42 U.S.C. 1973, and the one person-one vote principle of the Equal Protection Clause of the Fourteenth Amendment. Following a hearing, the district court found that the plaintiffs failed to prove either claim. On appeal, an earlier panel of this court affirmed the judgment on the constitutional claim but sent the § 2 issue back to the district court for a more thorough examination of plaintiffs' statistical evidence on racially polarized voting. On remand the district court again concluded that the districting plans in place in Attala County do not violate § 2 of the Voting Rights Act. We now find that the district court erred in drawing this conclusion in the face of plaintiffs' quantitative proof. We also find that the district court's crediting of the depressed level of black political participation in Attala County to black voter apathy untenable. We therefore reverse the decision of the district court and render judgment in favor of the plaintiffs.

BACKGROUND

The 1990 Census reported that blacks make up 7,299 or 39.5% of Attala County's total population of 18,481. Despite comprising such a significant proportion of the population, no black candidate has ever won a county-wide election or an election in a white majority district when pitted against a white candidate. That means, as the district court found, "no black candidates ever have won election to public office in Attala County as justice court judge, constable, sheriff, circuit clerk,

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[1]Teague v. Attala County, Miss., 17 F.3d 796 (5th Cir. 1994).

coroner, county attorney, or state senator, during modern times." The district court provided a full list of the relevant black candidates and contests, as well as a racial breakdown of the districts in its first opinion, Teague v. Attala County, 807 F.Supp. 392, 398-99 (N.D. Miss. 1992) ("Teague I").

The county's current redistricting plan provides for the election of five county supervisors, one from each of five single member districts, and two justice court judges (constables), one from each of two single member districts. Blacks are the majority among voters in only one of the five supervisor districts. That district is District 4, in which 59.3% of the voting age population is black. Blacks are a minority in both of the county's constable districts.

Attala County adopted its current districting outline for the board of supervisors following its last apportionment in 1983. The United States Department of Justice precleared the plan in accordance with § 5 of the Voting Rights Act on December 23, 1983. Likewise, the Justice Department granted preclearance to the county's present justice court districting plan on June 10, 1983. Following the 1990 census, the Justice Department insisted that Attala County redistrict to create two majority-black districts. Attala County rejected this idea and chose instead to use the existing districts.

The Statistical Evidence

Plaintiffs' experts proffered evidence of what they claimed to be racially polarized voting. This evidence came by way of two standard methods for analyzing electoral data: ecological regression analysis and extreme case analysis. The experts examined a number of elections within Attala County in which black candidates opposed white candidates and generated an estimated level of

support for black candidates by white voters and by black voters. Ecological regression analysis explains how voting and turnout correspond to the proportions of whites and blacks in each voting precinct. Extreme case analysis looks separately at the actual votes black candidates received in the most heavily black and white precincts to give a clear indication of the preference of voters for either black or white candidates in the two types of districts. The experts applied ecological regression analysis to show an average level of support for black candidates of 87% among black voters versus only 15% among white voters. According to plaintiffs' experts, these numbers jibe with the results of the extreme case analysis and demonstrate racial bloc voting.

At the first hearing, the district court was not convinced by the plaintiffs' evidence, concluding that "the current district plans neither dilute black voting strength nor deny blacks equal access to the political process in violation of § 2 of the Voting Rights Act.

Plaintiffs appealed the judgment. A panel of this court remanded on the issue of vote dilution. It found that the district court's findings on this claim were incomplete and required a fuller analysis of the statistical evidence.

On remand plaintiffs presented the testimony of another expert, Dr. Richard Engstrom. He examined three black-white post-remand elections in Attala County using ecological regression analysis. His report supported a finding of racial bloc voting. According to his analysis, support among black voters for black candidates ranged from 86.3% to 92.8% while support among white voters for black candidates ranged from 12% to 25.2%.

The United States offered its own expert, Dr. James W. Loewen, who looked at the same election results as did Dr. Engstrom. Dr. Loewen checked his regression results with complementary overlapping percentages analysis, a form of extreme case analysis[2]. Dr. Loewen found that on average in selected contests in Attala County since 1991 black voters supported black candidates by 84.2% while the average of whites supporting black candidates was merely 16.8%.[3] On the basis of these figures, Dr. Loewen concluded that "despite the strong political cohesion shown by the black community, the white community demonstrated bloc voting sufficient to usually defeat the blacks' candidates of choice, except in majority black districts."

Defense expert Dr. Ronald E. Weber also used ecological regression analysis and produced results similar to the statistical findings of the plaintiffs' experts. However, Dr. Weber did not use extreme case analysis to check his regression results because there is no supermajority black district comparable to areas where whites make up 80% or more of the voting age population.

Defendants also presented precinct election returns for separate analysis apart from extreme case or regression analysis. The district court identified election returns from two individual precincts, each from a different election, which it considered suggestive of particular instances of crossover voting.

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[2]He used this methodology because it obtains purportedly reliable estimates of the black vote without requiring highly concentrated black districts.

[3]Loewen analyzed elections for supervisor, election commissioner, constable, and justice court judge.

The District Court on Remand

The district court, after looking at the evidence a second time, again found that plaintiffs had failed to prove their § 2 claim. In particular, it found that plaintiffs established neither black political cohesion nor that voters in Attala County cast their votes on the basis of race to the exclusion of other nonracial factors, such as a candidate's experience, qualifications, education, and contact with the electorate.

Stressing language from the Act at 42 U.S.C. § 1973, the district court again concluded that "blacks have the same opportunity to participate in the political process and . . . elect representatives of their choice," and that the "political processes leading to the nomination or election in Attala County are equally open to black and white participation." The district court found that voter apathy resulting in reduced registration and turnout is a better explanation for the apparent political impotence of blacks in Attala County than systemic vote dilution. The court pointed to two pieces of evidence to support this conclusion. The first was a showing that, statewide, black and white voter registration rates were comparable. The second was the testimony of defendants' expert, Arthur Whittemore, a retired political science professor, who described a sharp state and national decline in voter participation equally affecting blacks and whites in recent years, which he attributed to increased voter apathy.

The district court also found no evidence in the record to suggest a lack of responsiveness on the part of elected officials to the particularized needs of blacks in Attala County. To arrive at that conclusion, it relied on the testimony of several "political veterans" that black support is important to electability in Attala County.

In summary, the district court found that blacks do indeed have the ability to participate in the political process and elect candidates of their choice equal to the ability possessed by the rest of the electorate. The district court decided after its re-review of the evidence that no one factor is outcome determinative and that the current districting plan neither dilutes black voting strength nor denies blacks equal access to the political process in violation of § 2 of the Voting Rights Act.

DISCUSSION

Standard of Review

The ultimate finding of vote dilution is a question of fact subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). Thornburg v. Gingles, 478 U.S. 30, 78-79, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). Under that standard, "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746(1948)). The analysis the district court must make to evaluate a § 2 claim is fact-intensive, requiring "an intensely local appraisal of the design and impact of the contested electoral mechanisms." Gingles, 478 U.S. at 79. That the legal standard the district court must apply to the facts of the claim may come into play does not change the standard of review. Id.

The Supreme Court first interpreted § 2 of the Voting Rights Act after its 1983 amendment in Thornburg v. Gingles. According to the Court, "[t]he essence of a

§ 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47. A violation has three elements: (1) the minority group must be sufficiently large and compact to constitute a majority in a single member district, (2) the minority group must be politically cohesive, and (3) it must be shown that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Id. at 50-51. The Supreme Court has held that the Gingles factors apply equally to challenges to single-member districts and challenges to multi-member districts. Growe v. Emison, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388, 404 (1993); Voinovich v. Quilter, 113 S. Ct. 1149, 1157, 122 L. Ed. 2d 500, 514 (1993). Failure to establish all three elements defeats a § 2 claim. The first threshold factor of compactness/numerousness under Gingles is not disputed in this case.

Even if plaintiffs satisfy these prerequisites, the court must still look to the "totality of the circumstances" to determine whether the challenged electoral system is equally open to minority voters. Johnson v. De Grandy, 114 S. Ct. 2647, 2657, 129 L. Ed. 2d 775 (1994).

Section 2(a) of the Voting Rights Act prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgment of the rights of any citizen of the United States to vote on account of race or color[.]" 42 U.S.C. 1973(a). Section 2(b) provides:

> A violation of subsection (a) is established if, based on the totality of the

> circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

Racial Bloc Voting

The existence of racial bloc voting pertains to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive. In other words, it shows that blacks as a group tend to support the same candidate as they would elect if voting in a single member, black majority district. Naturally, however, politically cohesive voting behavior will not elect the minority's candidate of choice if the majority group is similarly politically cohesive. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Gingles, 478 U.S. at 68. The United States, as appellant, argues that the district court erred in ruling that voting in Attala County was not racially polarized. In particular it faults the district court for requiring plaintiffs to prove affirmatively that voting there was based on race to the exclusion of other nonracial factors.

In Teague I, the district court found that plaintiffs' and defendants' expert testimony on racial bloc voting patterns varied "considerably." Teague I, 807

F.Supp. at 402. However, the court contradicted itself on remand based on much of the same data and analysis when it said that the defendants' expert yielded results similar to plaintiffs' experts. It criticized the plaintiffs' experts' methodology with respect to extreme case analysis because their analysis did not include any precincts with a 90% black voting age population. Finding a district with a black voting age population to measure against a district with a comparably homogeneous white voting age population is ideal for such analysis. However, the most heavily black precinct in Attala County is the Northeast precinct in District 2, which has only a 71.81% black voting age population. Plaintiffs' expert Cheri McKinless used only precincts with at least 80% white majority voting age population as subjects for her extreme case analysis. As in Teague I, the court did not give much weight to extreme case analysis that did not include a homogeneously black precinct, despite the fact that such a district does not exist in Attala County. Still the court accepted the evidence of racial polarization from the regression analysis and allowed that given the "strong indication of white bloc voting using the extreme case analysis . . . there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County."

But the court chose to go beyond those findings and looked to two elections where there was evidence of black crossover voting. These were the same two elections the court discussed in Teague I. The first was the 1991 first primary election for sheriff in which there were five candidates - four white and one black. In the Sallis precinct of District 4, the existing black super majority district, the court found "substantial black crossover voting which resulted in a white candidate's victory." In that

precinct the black voting age population numbered 564 and the white voting population was only 353. The court reasoned that if all white voters cast their ballots for the white candidates, then at least 232 black voters must have supported white candidates. The second election was the constable east district primary election of August 1987 where the black candidate, Michael Lee, received 96 votes from the McCool precinct. If all 96 of his votes had come from black voters, the court surmised, based on the black voting age population, black voter turnout would have had to have been around 88.1%. Given the historically low black voter turnout, the court found this rate to be incredible and more likely approximating the 12% level plaintiffs' own expert estimated. At that level, the black candidate would clearly have had to receive votes from whites in the precinct. According to the court, "[l]ack of black political cohesion . . . accounted for his loss, not white animosity." The district court counted these two anecdotes against the statistical evidence of polarized voting in Attala County: "Although the court does not hold that the results in these two elections alone disprove plaintiffs' case, . . . these two elections provide compelling evidence that voters in Attala County are not driven by race."

The Supreme Court in Gingles said that the results of a couple of elections do not discount the presence of racial bloc voting: "[a] pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." Gingles, 478 U.S. at 57. "a showing that bloc voting is not absolute does not preclude a finding of racial polarization." Gingles stressed that, to be legally significant, racial polarization need only be the "usual[]"

pattern for a significant proportion of voters. Id. Vote dilution is a determination that must be made over time and over the course of many elections. How many elections must be studied to make this determination depends on the particular circumstances of the locale. Id. at 57 n.25. However, we have no trouble concluding that the district court's assessment of vote dilution based on two precincts in two elections is insufficient to overcome the admittedly compelling statistical evidence of racial bloc voting in Attala County.

The language from Gingles quoted above directly undercuts the district court's reliance on the Sallis and McCool precinct returns. From those discrete examples of voting in two particular precincts in two different elections, the district court deduced that "voters in Attala County are not driven by race." This finding is clearly erroneous. The contrary statistical evidence is considerable, to say the least. In the case of the 1991 sheriff election, Michael Lee could not realistically be considered a serious candidate given the paucity of support (less than 10%) he received from any segment of the voting population. This election should not even have been examined because standard methodological procedure excludes races involving such marginal candidates. Campos v. City of Baytown, Tex., 840 F.2d 1240, 1245 n.7; Citizens for a Better Gretna v. City of Gretna, La., 834 F.2d 496 (5th Cir. 1987), cert. denied, 492 U.S. 905 (1989).

Plaintiffs' expert Cheri McKinless found sharp differences in the voting behavior of blacks and whites in Attala County and a distinct pattern of racial polarization between these groups. She analyzed eight elections ranging in office from district level supervisor to president of the United States and found little support for black candidates by white voters. In fact, in not one of the

elections she analyzed was there any significant white voter support for the black candidate and in only two elections did that support exceed 25%. For the remaining six elections the support by whites is less than 15%. Overall, an average of 15% support is given to the black candidates by the white voters; whereas, 85% of the white voters preferred white candidates.

In all eight elections McKinless examined blacks supported the black candidate at a significantly higher rate than did whites. In addition, a majority of the blacks chose the black candidate in every election. In all but one of the elections, the support given to the black candidate was 75% and above. On average, the black support for the black candidate was 87% compared to 13% support given to white candidates. Taken together these percentages indicate strong divisions along racial lines in the selection of candidates. Black candidates have realized electoral success against white candidates only in black majority districts. This consistent lack of black electoral success suggests that majority white districts may not provide black voters in Attala County with an equal opportunity to elect their candidates of choice, according to Loewen.

Through ecological regression analysis, Dr. Loewen demonstrated "overwhelming" white bloc voting: An average of 83.2% of all whites who voted in six elections surveyed voted for white candidates. Conversely, blacks were politically cohesive as well: An average of 84.2% of their ballots went to black candidates. In these elections, all since 1991, the proportion of white voters who voted for black candidates was never above 28% and averaged less than 17%. Black voters gave black candidates an average of 84.2% of their votes; nonetheless, black candidates had little hope for success except in majority black districts, owing to the white racial bloc voting.

Thus, despite the strong political cohesion shown by the black community, the white community demonstrated bloc voting usually sufficient to defeat the blacks' candidates of choice, except in majority black districts.

Dr. Loewen also calculated a high correlation between voting behavior and the racial composition of the districts. This relationship is expressed by a correlation coefficient, r, a statistical measure of the closeness of the fit between an independent variable (the racial composition of the election precinct) and a dependent variable (the level of support for a particular candidate). A high correlation coefficient justifies confidence in the underlying data. Correlation coefficients range in value from -1.00 to +1.00, from a perfectly inverse relationship to a perfectly positive one. The square of the correlation coefficient indicates the proportion of the variance that is associated with the independent variable.

Dr. Loewen figured the correlation coefficients and r^2s for the six black-white elections in Attala County after 1991 for which they could be computed. All six rs are above 0.5, and all but one are 0.9 or above, allowing extreme confidence in the underlying data and the ultimate regression estimates. Similarly the r^2s are high. All but one are above 0.8, and four of the six are above 0.9, indicating that race is the primary factor in the variation in the vote.

In the face of this compelling evidence the district court persisted in denying the racial basis of voting in Attala County. It repeated its statement in Teague I, 807 F.Supp. at 403, that the election analysis of the experts failed to prove racial polarization and that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance

than race to voters in Attala County." The district court opined that the record in this case is devoid of any proof that other factors such as these are as or more important than race in predicting voting behavior in Attala County. According to the court, "Statistical analyses do not encompass other factors and variables that provide further insight into voting behaviors and patterns. Statistics examine how, rather than why, people vote the way they do."

The district court's view disregards the established acceptance of regression analysis as a standard method for analyzing racially polarized voting. Gingles, 478 U.S. at 52-53 n.20. Furthermore, by this reasoning, the district court errs by placing the burden on plaintiffs to disprove that factors other than race affect voting patterns in Attala County. Plaintiffs are to present evidence of racial bias operating in the electoral system by proving up the Gingles factors. Defendants may then rebut the plaintiffs' evidence by showing that no such bias exists in the relevant voting community. Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994). The district court betrays its misunderstanding of this burden-shifting when it concludes that "factors other than race influence voters in Attala County, and therefore, plaintiff has failed to prove racial polarization" on the basis of there being "no proof in the record that in any way compares the candidates on any basis other than race." Such a showing is for the defendants to make. The lack of evidence in the record on this point favors the plaintiffs, not the defendants. By the district court's own reasoning, then, the plaintiffs' have prevailed in demonstrating racial bloc voting.

The district court concluded its discussion on racial bloc voting by citing anecdotal evidence from the trial to support its opinion that factors other than race

influence voters in Attala County. To that end, Troy Hodges, supervisor in District 3 in commenting on his experiences campaigning in the black area of Kosciusko testified that "[r]ace won't keep you from being elected," and that "blacks won't vote for a candidate just because [the candidate] is black or white." The district court also mentioned Alderman H.L. Myrick, who is black and who credited his success to significant white crossover voting as well as financial and campaign help from white citizens. He decried the assertion that Attala County voters mark their ballots on the basis of skin color instead of the candidate and his qualifications. Myrick did admit, however, on cross-examination, that whereas white and black volunteers together assisted a white candidate in a contest against another white candidate, no whites campaigned for black candidates.

Largely on the basis of this testimony, the district court found that black and white crossover voting has a significant impact on election outcomes in Attala County. The court found that "[a]lthough the statistical evidence may weigh in favor of a finding of racial polarization," this evidence is insufficient, failing "to establish that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors, such as a candidate's experience, qualifications, education and contact with the electorate."

Plaintiffs countered with the testimony of Jesse Fleming, a former supervisor from black majority District 4. Fleming testified that within Attala County, voting so severely splits along racial lines that black candidates cannot win elections unless they run in a majority black district. Fleming supplemented this testimony with accounts of racially hostile encounters he and other black candidates received from whites.

Plaintiffs presented additional lay testimony indicating the presence of voting along racial lines. Defense witness Charles England, a former County Chancery Clerk, admitted on cross-examination that it is easier for a candidate to become popular with a voter if the candidate and the voter are of the same race. England acknowledged that churches, private clubs, social organizations, and other aspects of social life in Attala County are racially segregated, and that as a result, personal familiarity is associated with race.

"The district court is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists." Teague, 17 F.3d at 798. Still, the district court does have an obligation to give particularized findings when it discredits the statistical evidence, especially where the evidence is weighty. And it is weighty here. Indeed, the district court did not even have to choose among competing opinions based on the statistics. The results of the regression analyses of both plaintiffs' and defendants' experts were consistent. And when the district court looked to lay testimony, even the anecdotal evidence was conflicting.

This is not to say that the district court rejected the statistical evidence outright, or that it questioned the accuracy of the numbers. Indeed, the court concluded that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." The court expressed its opinion, with which we agree, that the statistics do no capture all the reasons motivating a voter. The difficulty is that the district judge then refused to accord any presumption to the virtually unchallenged statistical case and placed the additional burden on the plaintiffs to prove that "racial polarization, experience, qualifications, education, and contact with the

electorate" were not the true explanations for the voting patterns. As the district court put it, "Conspicuously missing from the record in this cause is any proof to the contrary. Of the black-white elections analyzed, there is no proof in the record that in any way compares the candidates on any basis other than race." In the face of a strong statistical case that defendants were unable to shake, general statements that race played no role at the polls carry little weight, and a district court errs by adjusting the plaintiffs' burden of proof on the basis of such testimony. In short, the district court placed upon the plaintiffs the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant had itself produced no real evidence that factors other than race were at work.

This court remanded for a more thorough discussion by the district court of the statistics which made up the principal evidence plaintiffs offered. But the district court chose to skirt this charge by averring that "this evidence alone is not sufficient." Without substantially more in the way of particularized findings contradicting the numbers, the district court may not totally discount methodology that both the Supreme Court and this court have cited with approval. Gingles, 478 U.S. at 52-54; Campos, 840 F.2d at 1246 n.9. Doing so was in disregard of the remand order.

After a careful and complete review of the trail court record, we find overwhelming evidence of racial polarization. The results of the statistical analyses in this case create a strong presumption in favor of a finding of black political cohesion and racial bloc voting. As in Teague I, the district court, on remand, did not accept this presumption. We hold that finding to constitute clear

error. Even relying on the anecdotal evidence, the district court should have found it ambiguous at best and certainly not dispositive. Rather the court apparently chose to accept some and ignore others. And while the court does have discretion in the manner in which it weighs the facts, the statistical evidence here is so one-sided as to require a more convincing discussion of the lay testimony before refuting the objective results. The district court failed to give the serious consideration to the statistical evidence for which this case was remanded. Although there may be cases in which even proof of the three Gingles factors may not sustain a vote dilution claim, this is certainly not such a case. We find that the plaintiffs have successfully carried the burden on their vote dilution claim.

Totality of the Circumstances

Again, a finding of the three Gingles preconditions does not end the inquiry. Reviewing courts are to look beyond the Gingles threshold factors when evaluating vote dilution claims. Nipper, 39 F.3d at 1513. As the Supreme Court said, "Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." De Grandy, 114 S. Ct. at 2657. A defendant may try to rebut plaintiffs' claim of vote dilution via evidence of "objective, nonracial factors under the totality of the circumstances standard." Nipper, 39 F.3d at 1513.

The Voting Rights Act as amended invalidates any "standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . ." It says that a denial or abridgment occurs where,

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b).

Gingles says that the reviewing court is to be flexible in its totality inquiry and guided by factors drawn from the Senate Judiciary Committee report on the 1982 amendments to the Voting Rights Act and reference Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Gingles, 478 U.S. at 44. These factors include

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals; [and]

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36-37 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07). Additional factors that may be probative in some cases as part of plaintiffs' evidence establishing a voting rights violation are

(1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]

(2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 37. The district court on remand made the same totality determination as it did in Teague I. The court still found that Attala County's electoral system does not violate § 2 and that blacks have the same opportunity as whites to participate in Attala County's electoral system.

The district court held that evidence of past discrimination and present socioeconomic disparities between blacks and whites does not predominantly explain voting patterns in Attala County. These factors, it concluded, while they do exist and have a significant impact, still do not tip the scales in favor of a § 2 vote dilution violation. The court repeated its explanation that other factors such as voter apathy have resulted in low voter registration and turnout among blacks in Attala County. In its opinion, plaintiffs have failed to prove that past discrimination presently affects voting behavior in Attala County and, even if it does, that impact is greater than many other influences.

The court next looked to the arguments that socioeconomic disparities between black and white voters have had an impact on political opportunity. Again the court credited the defendants' argument that voter apathy explains the depressed level of political participation by blacks in Attala County. Quoting Teague I, the court found:

> Rather than unequal opportunity, the source of minority candidate defeat can be traced to the failure to energize an apathetic electorate. Voter apathy afflicts society in general, transgressing every socio-economic level and knowing no barriers. Political victories are the fruit of organizing, energizing and mobilizing an electorate to turn out and vote for a particular candidate.

The court cited the testimony of defendants' trial expert, Arthur Whittemore, who attributed sharp declines in voter participation and voter turnout by both blacks and whites from 1988 to 1990 to increased voter apathy statewide and nationally.

The district court found no evidence in the record that elected officials are unresponsive to the "particularized needs" of blacks relative to whites in Attala County. In support of this finding, the court looked to the lay testimony described earlier from county polls testifying to the necessity of black support for winning elections.

The court found no one factor determinative of blacks' ability to participate in the political process, and that in the totality of the circumstances blacks in Attala County have just as much opportunity to participate in the political process and elect candidates of their choosing as do whites in the county. This finding by the district court is clearly erroneous.

In Clark v. Calhoun County, 21 F.3d 92 (5th Cir. 1994), this court held:

> [I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but

> still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act.

Id. at 97. Attala County is not that unusual case. The district court did not take adequate notice of the considerable statistical evidence of vote dilution. The conclusion it drew in its totality discussion is similarly dubious, relying entirely on the denials of a few lay witnesses and ignoring the contrary testimony of others. The district court did not place this testimony in the context of the area's history of voter exclusion nor give voice to any plausible nonracial explanation for Attala County's voting patterns.

That Mississippi has a long and dubious history of discriminating against blacks is indisputable. Furthermore, as the district opined on remand, there is no question that grave socioeconomic disparities exist between blacks and whites in Attala County. Still, what must be shown is that the effects of past discrimination impede the ability of blacks in Attala County to participate in the political process. League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 866 (5th Cir. 1993). Plaintiffs are not required to prove a causal connection between these factors and a depressed level of political participation. Quoting the Senate report, this court noted in LULAC that:

> The courts have recognized that disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Id. at 867 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.114, reprinted in 1982 U.S.C.C.A.N. 177, 207 n.114).

Dr. Loewen's analysis of elections since 1991 showed that black participation is lower than white participation in Attala County as did the report of defendants' expert Dr. Weber. This disparity in voting parallels racial disparities in registration. Dr. Loewen attributed these disparities to socioeconomic gaps between blacks and whites in Attala County. He calculated that 95.9% of the white voting age population was registered compared to 76.1% of the black voting age population.

Dr. Loewen discussed how these depressed levels of political participation correlate to blacks' socioeconomic status. He reported that black families are more than 3.5 times as likely to be poor than are white families. Almost 47% of black families live below the poverty level whereas that figure for whites is around 13%. Roughly three out of every four families with annual incomes below $5,000 are black. Sixty percent of the families making $5,000 to

$10,000 are also black. The median family income for whites is almost twice the amount for black families.

Employment figures help explain why blacks fare so poorly economically in Attala County. The unemployment rate in the black community is 12.9%, nearly twice that in the white community. Among the employed, one-third of white workers are in white collar occupations. Admittedly, this is a low figure by national standards; but it nevertheless is three times the rate for black workers. Dr. Loewen built upon these socioeconomic indicators to surmise that blacks, being more heavily concentrated in wage-earning positions, do not have the same level of flexibility come election day to leave their jobs and vote as salaried employees typically do. These blue collar workers may have to wait until the end of the day when lines at the polls are longest and are therefore discouraged from making the commitment to wait it out to cast their ballot.

Finally, Dr. Loewen offered the differences in educational achievement between blacks and whites in Attala County as an explanation for socioeconomic disparities. He reported that whites are almost twice as likely as blacks to have graduated from high school. Whites are 2 1/2 times more likely to have graduated from college.

The district court determined that voter apathy influenced election results in Attala County largely on the basis of testimony from defendant's trial expert, Whittemore, who testified regarding a sharp decline in voter participation and voter turnout by both blacks and whites from 1988-1990. To conclude that black voter apathy is the reason for the failure of blacks to elect the candidates of their choice when apathy affects all voters is

counterintuitive. The fact that blacks and whites in Attala County are going to the polls in decreasing proportions does not explain why blacks alone are essentially shut out of the political processes of the county.

The considerable evidence of the socioeconomic differences between black and white voters in Attala County argues against the district court's reiteration that black voter apathy is the reason for generally lower black political participation. The presence of voter apathy is not a matter for judicial notice. Kirksey v. Board of Supervisors, 554 F.2d 139, 145 (5th Cir.) (en banc), cert. denied, 434 U.S. 968, 98 S. Ct. 512, 54 L. Ed. 2d 454 (1977). The record before us does not contain evidence to support the district court's conclusion that voter apathy is the reason for the failure of blacks in Attala County to elect the candidates of their choice to political office. See United States v. Dallas County Comm'n, 739 F.2d 1529, 1536 (11th Cir. 1984).

We are not denying that the ultimate inquiry of Section 2 is racial discrimination; nor are we holding that a defendant cannot offer evidence of the nonracial reasons for the voting patterns. In LULAC we did not hold that the plaintiff has the burden of negating all nonracial reasons possibly explaining plaintiffs' statistical case. That case concerned a different problem - the role of partisan politics.

CONCLUSION

For the foregoing reasons we find that the district court clearly erred in finding that the 1983 supervisory and justice court judge redistricting plans for Attala County do not diminish minority voting power in violation of § 2 of the Voting Rights Act, as amended. The case is remanded for the development and implementation of a remedial

plan to cure the vote dilution caused by the existing redistricting plans and for a determination of what amount, if any, the plaintiffs are entitled to recover in court costs and attorneys' fees. REVERSED, RENDERED, AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60204

BERNARD TEAGUE; LEROY GLADNEY; L B WINTERS

Plaintiffs - Appellants

UNITED STATES OF AMERICA,

Intervenor Plaintiff - Appellant

v.

ATTALA COUNTY, MS; ATTALA COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, by and through its Chairperson, Don Hayes; ATTALA COUNTY REPUBLICAN EXECUTIVE COMMITTEE, by and through its Chairperson, Scott Wiggers; ATTALA COUNTY ELECTION COMMISSION, by and through its Chairperson, Mildred Casey,

Defendants - Appellees

Appeals from the United States District Court for the Northern District of Mississippi, Aberdeen

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 8/8/96, 5 Cir., _____, _____ F. 3d _____)

(January 22, 1997)

Before LAY*, HIGGINBOTHAM and STEWART, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

*Circuit Judge of the Eighth Circuit, sitting by designation.

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED, 42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: ***Provided***, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(2)

Supreme Court, U.S.
FILED
MAY 23 1997
CLERK

No. 96-1695

IN THE

Supreme Court of the United States

October Term, 1996

ATTALA COUNTY, MISSISSIPPI, ET AL.,
Petitioners,

v.

BERNARD TEAGUE, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BERNARD TEAGUE, ET AL.

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26 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in its holding that, in light of the totality of circumstances, the plaintiffs proved a violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, under the particular facts of this case?

TABLE OF CONTENTS

STATEMENT 1

ARGUMENT 12

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 16

Clark v. Calhoun County, Miss., 21 F.3d 92 (5th Cir. 1994) 15

Johnson v. DeGrandy, 512 U.S. 997 (1994) 13-15, 19-20

Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.)(en banc), **cert. denied**, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed. 2d 454 (1977) 12

LULAC v. Clements, 999 F.2d 831 (5th Cir. 1993)(en banc), **cert. denied**, 114 S.Ct. 878 (1994) 12-13

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), **cert. denied**, 115 S.Ct. (1995) 13

Teague v. Attala County, Miss., 92 F.3d 283 (5th Cir. 1996) 2

Teague v. Attala County, Miss., 17 F.3d 796 (5th Cir. 1994) 2

Teague v. Attala County, Miss., 807 F. Supp. 392 (N. D. Miss. 1992) 2, 10

Thornburg v. Gingles, 478 U.S. 30 (1986) 9-11, 13-16

United States v. Dallas County Comm'n, 739 F.2d 1529 (11th Cir. 1984) 12

Velasquez v. City of Abilene, 725 F.2d 1017 (5th Cir. 1984) 15

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989) 15

STATUTES & RULES

Section 2 of the Voting Rights Act, 42 U.S.C. §1973 ..... passim

Miss. Code §23-15-305 6

No. 96-1695

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ATTALA COUNTY, MISSISSIPPI, ET AL.,
Petitioners,

v.

BERNARD TEAGUE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BERNARD TEAGUE, ET AL.

This is a garden variety redistricting case brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. It presents no novel issues of law, no conflict between the Circuits or with precedents of this Court, and no basis upon which this Court should exercise its certiorari jurisdiction. The issues raised by the petitioner are issues that actually do not exist in the case, and the petitioner's claim that they do exist is based upon a misconstruction of the opinion of the Court of Appeals.

STATEMENT

This case involves a challenge to the redistricting plan in

Attala County, Mississippi used to elect five supervisors and five election commissioners from five single member districts and the separate redistricting plan used to elect two justice court judges and two constables from two single member districts. The respondents Bernard Teague, et al., black voters from Attala County, filed this case on August 7, 1991, alleging that these plans violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and also alleging that the supervisors' plan violates the one-person, one-vote rule of the Fourteenth Amendment because it has a total population deviation of 14.4 percent.

After a three day bench trial in September, 1992, the District Court found for the defendants on all claims. 807 F.Supp. 392 (N.D. Miss. 1992), pet. app. 1. The plaintiffs appealed and on April 1, 1994, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the District Court's ruling on the one-person, one-vote claim, but reversing and remanding for further proceedings on the Section 2 claim. 17 F.3d 796 (5th Cir. 1994), pet. app. 26. On remand, the United States intervened in support of the plaintiffs. The District Court permitted the parties to introduce evidence regarding events and elections occurring since the original trial, and the parties agreed to present this evidence by way of affidavits. On March 20, 1995, the District Court ruled once again for the defendants. Pet. App 32. The private plaintiffs and the United States both appealed, and on August 8, 1996, the Fifth Circuit reversed, holding that the plaintiffs had proven a Section 2 violation and remanding for further proceedings in which the County would have an opportunity to develop a remedy. 92 F.3d 283 (5th Cir. 1996), pet. app. 58. The defendants sought rehearing and rehearing en banc, both of which were denied on January 22, 1997 in an order stating that no member of the panel and no judge in active service had requested a poll on the suggestion of rehearing en banc. Pet. App. 86.

Approximately 40% of the citizens of Attala County, Mississippi are black. Despite this fact, no black citizens have been elected in modern times to public office in Attala County as justice court judge or constable, or any of a host of other county offices. Pet. App. 34, 38-39. Prior to 1984, there were no black members of the county board of supervisors, and since then there has never been more than one. Pet. App. 7, 55; Pretrial Order at 5; Exhibit D-3. Prior to 1988, there were no black members of the county election commission, and since then there has never been more than one. **Id.** No black citizen has won election to a county office from a majority white voting age population (VAP) election district. The only black candidates elected to county office ran from the few majority-black VAP election districts that exist in the county. Indeed, in the entire county, no black candidate has ever won a contested election for **any** office -- county or municipal -- from a majority-white VAP election district. Pet. App. 7, 38-39, 55 and n. 16.

The two redistricting plans under challenge in this case were adopted in 1983. Even though the county is 40% black, the supervisors plan has only one majority black VAP district among the five districts, and that is the district from which the only black members of the board of supervisors and the election commission have been elected. Pet. App. 2-8, 34-37, 55, Pretrial Order at 5. And even though the county is 40% black, neither of the two districts in the justice court plan is majority black. Pet. App. 38.

When the 1990 census data was released, several years after these plans were adopted, the data demonstrated a 14.4% deviation among the existing supervisory districts. Accordingly, Attala County retained a demographer to develop a new supervisory plan based upon the 1990 data. During this redistricting process, a group of black citizens came before the board of supervisors at the public hearing and requested that

supervisory district 2 be reconfigured to contain a majority black VAP district. Trial transcript 160-161. The demographer later prepared a supervisory redistricting plan with two majority black VAP supervisory districts. Tr. 167. This plan was never adopted by the board of supervisors. Instead, Attala County adopted a new supervisory plan based on 1990 data containing only one majority black VAP district and that plan was submitted for Section 5 review. On July 15, 1991, the United States Attorney General received the submission and interposed a Section 5 objection by letter dated January 13, 1992. Pretrial Order at 7.

Rather than design a new plan, the county decided to continue using the 1983 plan. Because of the county's decision to retain the 1983 plan, the trial of this case and the evidence presented during the remand focused on that plan. The evidence demonstrates the following:

** As the District Court found, the county easily could have drawn a compact second black majority voting age population district among the five districts in the supervisory plan, and easily could have drawn one compact black majority voting age population district among the two in the justice court plan. Pet. App. 16-17, 28 n.2, 40.

** Elections between black and white candidates in the county are characterized by racially polarized voting. As the District Court stated on remand: "[T]here can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." Pet. App. 48. The District Court cited the ecological regression findings of the plaintiffs' expert at the original trial to the effect that white voters gave, on average, 85% of their vote to white candidates and 15% to black candidates in black-white races, while black voters gave, on average, 87% of their vote to black candidates and 13% to white candidates. Pet. App. 45. The District Court also noted the

ecological regression findings of the plaintiffs' and intervenor's experts on remand showing that in the post-trial black-white elections, approximately 83% of white voters supported white candidates and 17% supported black candidates, on average, while approximately 90% of black voters supported black candidates and 10% supported white candidates, on average. Pet. App. 45. As the District Court pointed out, the findings of the defendants' expert were "similar to the . . . findings of the plaintiffs' experts." Pet. App. 44, 46. The plaintiffs' experts also used an "extreme case" analysis, showing that black candidates received a very small percentage of the vote from precincts with 80% or more of white voters. Pet. App. 47.

** The result of this pattern of racial polarization is that no black candidates have been elected to county office in Attala County from majority white voting age population districts, and none have won a contested election to any sort of office -- county or municipal -- from a majority white voting age population district. Pet. App. 38-39, 55 and n.16. Indeed, no black candidate has ever received a majority of the white vote in a county election. Pet. App. 50. All of this led the District Court to conclude that "the statistical evidence . . . favors a finding of racial bloc voting." Pet. App. 48.

** There is a long history of racial discrimination in Mississippi and Attala County that included discrimination with respect to the right to vote. Pet. App. 52-53; Tr. 11, 136-139. As the District Court stated: "There can be no question of the long history of discrimination against blacks in Mississippi and Attala County." Pet. App. 52-53.

** Among the vestiges of this discrimination are the severe socioeconomic disparities that leave black citizens in Attala County much worse off than white citizens. As the District Court said: "There can be no question of the socioeconomic disparities between whites and blacks in Attala

County." Pet. App. 53. For example, black per capita income is less than half that of whites, the black poverty rate is nearly three times that of whites, the black unemployment rate is nearly twice that of whites, and the white high school graduation rate is nearly twice that of blacks. Ex. P-2.

** The rate of black turnout for elections is much lower than that of whites. Exhibit P-1 at 3. As the District Court stated: "[P]laintiffs have already proven and the court has found evidence of depressed black voter participation in Attala County." Pet. App. 54.

** Mississippi uses a majority-vote requirement for primary and special elections involving county offices. Miss. Code § 23-15-305; Pretrial Order at 8.

** Racial appeals have been made in elections in Mississippi and within Attala County. Tr. 171-173.

** Racist remarks have been made and racial epithets have been used by several white elected supervisors in recent years in Attala County, and evidence was presented that the presiding officer of the board of supervisors once said someone was as "stubborn as a nigger mule." Tr. 193-195.

** Only a handful of black citizens serve on county boards and commissions, and there are few black employees in county jobs, with the exception of manual labor jobs. Tr. 178-179, 381-384.

** Civic, social, and religious life in Attala County is segregated by race. Churches are segregated by race as a practical matter, as are country clubs, civic clubs, and social clubs. Tr. 187-188, 344.

Despite all of this evidence, and despite the 40% black

population in the county, the District Court upheld the supervisory plan with only one black-majority voting age population district of five and the justice court plan with no black-majority voting age population district of two. In its initial opinion, the District Court rejected the plaintiffs' proof of racial polarization in voting. Pet. App. 17-20. Alternatively, the District Court held that even if Attala County elections are afflicted by polarized voting, black voters have an equal opportunity under the challenged plans in light of the totality of circumstances. The Court based this holding largely on its conclusion that black electoral failure in the county is the result of "the failure to energize an apathetic electorate." Pet. App. 21-23.

On appeal, the Fifth Circuit vacated and remanded, holding that the District Court had failed to consider and discuss the plaintiffs' ecological regression evidence of polarized voting. Pet. App. 30-31.

On remand, after receiving additional evidence of post-trial events, the District Court once again rejected the plaintiffs' Section 2 claim. Although that Court concluded that "there can be **no doubt** that the statistical evidence in the record favors a finding of racial bloc voting in Attala County," pet. app. 48 (emphasis added), the Court inexplicably held that the plaintiffs had failed to prove racial bloc voting. The Court stated: "Although statistical evidence may weigh in favor of a finding of racial polarization, the court is of the opinion that this evidence alone is not sufficient." Pet. App. 51. More specifically, the Court said statistical evidence of polarization is insufficient because "[s]tatistics examine how, rather than why, people vote the way they do." Pet. App. 50. The Court held that the strong evidence of polarization from the ecological regression analysis was insufficient to prove black political cohesion, pet. app. 48; that the analysis of a single precinct in one election and another precinct in another election indicated some level of black

crossover voting, pet. app. 19-20, 48-49, 51; and that two defense witnesses had expressed the opinion that citizens in Attala County sometimes based their votes on nonracial factors. Pet. App. 50-51. On these grounds, and despite the strong evidence of racial polarization, the District Court concluded that the plaintiffs "have failed to establish that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors . . . ." Pet. App. 51. Accordingly, the District Court ruled for the defendants on the racial polarization issue.

In the alternative, the District Court held that -- even if racial bloc voting were found -- the plaintiffs would lose their case under the totality of circumstances. Despite the presence of a history of discrimination and socioeconomic disparities, the District Court held that the plaintiffs had failed to prove that these factors contribute to the depressed level of participation, holding instead that the disparities in participation are the result of what the District Court called "apathy." Pet. App. 52-55. The District Court also stated that "factors other than race influence voters in Attala County." Pet. App. 55. It repeated its holding from before the remand that "[r]ather than unequal opportunity, the source of minority defeat can be traced to the failure to energize an apathetic electorate." Pet. App. 54. On these grounds, and despite the evidence of severe polarization and the consistent defeat of black candidates in majority-white districts, the District Court concluded -- under the totality of circumstances -- that "blacks in Attala County have the ability to . . . elect candidates of choice equal to that of others in the electorate." Pet. App. 57.

Both the private plaintiffs and the United States appealed. The Fifth Circuit reversed, citing the District Court's own finding that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County," and holding that the District Court erred in refusing to

give any credence to that finding in its ultimate judgment. As the Court of Appeals explained, the District Court erred by completely disregarding the evidence from the regression analysis, and instead basing its conclusion regarding polarized voting on the results from a single precinct in one election and another precinct in in another election. The Court of Appeals also said the District Court erred by concluding that non-racial factors were the cause of the consistent defeat of black candidates in majority-white districts in the midst of polarized voting, when in fact there was no proof to that effect other than generalized statements from two local politicians.

As the Court of Appeals said:

> The Supreme Court in **Gingles** said that the results of a couple of elections do not discount the presence of racial bloc voting: "[a] pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." **Gingles**, 478 U.S. at 57. "a showing that bloc voting is not absolute does not preclude a finding of racial polarization." **Gingles** stressed that, to be legally significant, racial polarization need only be the "usual[]" pattern for a significant proportion of voters. **Id**. Vote dilution is a determination that must be made over time and over the course of many elections. How many elections must be studied to make this determination depends on the particular circumstances of the locale. **Id**. at 57 n.25. However, we have no trouble concluding that the district court's assessment of vote dilution based on two precincts in two elections is insufficient to overcome the admittedly compelling statistical evidence of racial bloc voting in Attala County.
>
> The language from **Gingles** quoted above directly undercuts the district court's reliance on the Sallis and

> McCool precinct returns. From those discrete examples of voting in two particular precincts in two different elections, the district court deduced that "voters in Attala County are not driven by race." This finding is clearly erroneous.

Pet. App. 68-69.

> [The District Court] repeated its statement in **Teague I**, 807 F.Supp. at 403 . . . that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." . . . According to the [District] court, "Statistical analyses do not encompass other factors and variables that provide further insight into voting behaviors and patterns. Statistics examine how, rather than why, people vote the way they do."
>
> The district court's view disregards the established acceptance of regression analysis as a standard method for analyzing racially polarized voting. **Gingles**, 478 U.S. at 52-53 n. 20.

Pet. App. 71-72.

> In the face of a strong statistical case that defendants were unable to shake, general statements that race played no role at the polls carry little weight, and a district court errs by adjusting the plaintiffs' burden of proof on the basis of such testimony. In short, the district court placed upon the plaintiffs the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant had itself produced no real evidence that factors other than race were at work.
>
> [In the first appeal] [t]his court remanded for a more

> thorough discussion by the district court of the statistics which made up the principal evidence plaintiffs offered. But the district court chose to skirt this charge by averring that "this evidence alone is not sufficient." Without substantially more in the way of particularized findings contradicting the numbers, the district court may not totally discount methodology that both the Supreme Court and this court have cited with approval. **Gingles**, 478 U.S. at 52-54. . . .
>
> After a careful and complete review of the trial court record, we find overwhelming evidence of racial polarization. . . . The district court failed to give serious consideration to the statistical evidence for which this case was remanded.

Pet. App. 75-76.

The Court of Appeals also held that the District Court erred in concluding that, despite the "totality of circumstances" evidence showing a violation, there was no violation because, in the District Court's words, "[r]ather than unequal opportunity, the source of minority candidate defeat can be traced to the failure to energize an apathetic electorate." Pet. App. 54. The District Court specifically based this conclusion on evidence showing lower voter participation in recent years among **both** blacks and whites. As the Court of Appeals explained:

> The district court determined that voter apathy influenced election results in Attala County largely on the basis of testimony from defendant's trial expert, Whittemore, who testified regarding a sharp decline in voter participation and voter turnout by both blacks and whites from 1988-1990. To conclude that black voter apathy is the reason for the failure of blacks to elect the candidates of their choice when apathy affects all voters is counterintuitive. The fact

> that blacks **and** whites in Attala County are going to the polls in decreasing proportions does not explain why blacks alone are essentially shut out of the political processes for the county.
>
> . . . . The presence of voter apathy is not a matter for judicial notice. **Kirksey v. Board of Supervisors**, 554 F.2d 139, 145 (5th Cir.)(en banc), **cert. denied**, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed. 2d 454 (1977). The record before us does not contain evidence to support the district court's conclusion that voter apathy is the reason for the failure of blacks in Attala County to elect the candidates of their choice to political office. **See, United States v. Dallas County Comm'n**, 739 F.2d 1529, 1536 (11th Cir. 1984).

Pet. App. 83-84 (emphasis in original).

ARGUMENT

The questions presented by the petitioners are questions that do not actually exist in this case. They are, in effect, manufactured by the petitioners based upon a misconstruction of the Court of Appeals' holding.

Because the second of the two questions can be discussed more quickly, we deal with it first. According to the petitioner, the Court of Appeals "confined Petitioners' proof of nonracial explanations [of voting patterns and electoral results] to evidence that voters choose candidates based on partisanship, not race." Pet. Cert. 23. To support this, the petitioner cites the Court of Appeals' discussion of the en banc Fifth Circuit decision in **LULAC v. Clements**, 999 F.2d 831 (5th Cir. 1993) (en banc), **cert. denied**, 510 U.S. 471 (1994). In the present case, the Court said: "In **LULAC**, we did not hold that the plaintiff has the burden of negating all nonracial reasons possibly

explaining plaintiffs' statistical case. That case concerned a different problem -- the role of partisan politics." Pet. App. 84. However, this description of **LULAC** was never used by the Court of Appeals to restrict nonracial explanations in this case to partisan voting. Indeed, the Court of Appeals made it clear that a district court should consider any proffered evidence of nonracial factors -- without restriction -- that would account for the voting patterns at issue. Pet. App. 72. On this point, the Court of Appeals, pet. app. 72, cited the Eleventh Circuit's en banc decision in **Nipper v. Smith**, 39 F.3d 1494, 1524 (11th Cir. 1994) (en banc), **cert. denied**, 115 S.Ct. (1995), which held the same thing. Had the Court of Appeals limited the analysis to partisan explanations, much of its discussion of other purported nonracial factors, pet. app. 72-75, would have been irrelevant. Rather than limiting the scope of nonracial explanations to partisan voting patterns, the Court of Appeals instead held that the District Court erred because there was "no real evidence that [any] factors other than race were at work" in the relevant elections. Pet. App. 75.[1]

As for the first question presented, it is based upon the petitioner's view that the Court of Appeals adopted -- to use the language of the page of questions presented, -- "a presumption" that plaintiffs can "establish[] a violation of § 2 . . . by offering statistical evidence that black and white voters prefer different candidates." Of course, the Court of Appeals did no such thing. Instead, consistent with this Court's holding in **Johnson v. DeGrandy**, 512 U.S. 997 (1994), it first analyzed whether the

---

[1] Much of the Court of Appeals' discussion, including the descriptive reference to **LULAC,** revolved around where the burden falls of producing evidence of nonracial explanations. Pet. App. 72-75, 84. As is clear from the petition for certiorari itself, the petitioners actually agree with the Court of Appeals that, once a plaintiff proves the **Gingles** factors, defendants such as petitioners have the burden of presenting evidence of nonracial explanations for the voting patterns. Pet. Cert. 24-25 n.8.

plaintiffs had established the **Gingles** factors. As the Court of Appeals noted, these are established not simply by a showing regarding polarized voting, but also a showing that "(1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single member district," pet. app. 65 -- a factor about which there was no dispute in this case. Pet. App. 16-17, 28 n.2, 40. Moreover, the necessary polarized voting showing is not made simply by -- to use the petitioner's language -- "statistical evidence that black and white voters prefer different candidates," but as the Court of Appeals explained, by a demonstration that "(2) the minority group [is] politically cohesive and (3) . . . that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." Pet. App. 65, **citing, Thornburg v. Gingles**, 478 U.S. at 50-51. The Court of Appeals then stated that "[e]ven if the plaintiffs satisfy these prerequisites, the court must still look to the 'totality of circumstances' to determine whether the challenged electoral system is equally open to minority voters." Pet. App. 65, **citing, Johnson**, 512 U.S. at 1011-1012.

According to the petitioners, the "presumption" about which they complain comes from this language in the Court of Appeals opinion:

> [I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three **Gingles** factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act.

Pet. App. 80-81, **quoting, Clark v. Calhoun County**, 21 F.3d 92, 97 (5th Cir. 1994).

The first sentence of this quote is not any sort of legal presumption, but simply a description of the empirical fact that most plaintiffs who establish the existence of the three **Gingles** factors go on to prove a violation under the totality of circumstances. This is quite similar to what this Court said in **Johnson**: "[L]ack of equal electoral opportunity may be readily imagined and **unsurprising** when demonstrated under circumstances that include the three essential **Gingles** factors." 512 U.S. at 1012 (emphasis added). But just as this Court added in **Johnson** that such a "conclusion must still be addressed explicitly, and without isolating any other arguably relevant facts from the act of judgment," **id.**, the Court of Appeals specifically held that even if plaintiffs satisfy the **Gingles** factors, they must still prove their case based upon an analysis of the totality of circumstances. Pet. App. 65. The Court of Appeals never held that proof of the **Gingles** factors creates any sort of "presumption."

The second sentence of the Court of Appeals quote merely instructs district courts to make detailed findings when they conclude that the **Gingles** factors are present but no Section 2 violation exists. Rather than "dramatically chang[ing] the law of § 2," as the petitioners insist, pet. cert. 17, this is in keeping with longstanding precedent in the Fifth Circuit requiring district courts to make detailed findings and to consider both supporting and contrary evidence in resolving vote dilution cases. **See, Westwego Citizens for Better Government v. Town of Westwego**, 872 F.2d 1201, 1203-1204 (5th Cir. 1989) ; **Velasquez v. City of Abilene**, 725 F.2d 1017, 1023 (5th Cir. 1984).

Nothing about any of this violates precedent from this Court or conflicts with that from other Circuits.

The petitioners go on to contend that this so-called "presumption" is aggravated because, they say, the Court of Appeals "combined the second and third **Gingles** factors into a single statistical analysis of whether racially polarized voting existed," and thus "effectively collapsed the 'totality of circumstances' inquiry -- a multi-factor analysis -- into a single-factor analysis . . . ." Pet. Cert. 17-18. As we have already pointed out, the Court of Appeals did not hold that racially polarized voting by itself was sufficient to prevail in a Section 2 case. As for the purported combination of the second and third **Gingles** factors, this Court in **Gingles** pointed out that both of those factors are related to the question of polarized voting. "The purpose of inquiring into the existence of racially polarized voting is two fold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority preferred candidates." 478 U.S. at 56. The Court of Appeals' discussion of the second and third factors is fully in keeping with **Gingles**. Indeed, the evidence was quite clear that black voters generally supported black candidates and white voters did not, instead voting sufficiently as a bloc for white candidates to **always** defeat the candidate of choice of black voters in majority white election districts.

The petitioners also assert that the so-called "presumption" about which they complain was further aggravated by the following:

> The Court of Appeals compounded its error by improperly substituting its view of the facts for that of the District Court on the question of whether Respondents had proved racial bloc voting. The District Court found that the expert testimony presented by the parties "on racial bloc voting patterns varied considerably," . . . (App. 44), although that court found that the evidence favored Respondents, . . . (App. 48). The District Court also concluded, however,

> that such findings "do not end the inquiry." *Id.* (App. 48). Relying on the testimony of both black and white politicians in the County, the District Court found that county voters cast their ballots not on the basis of race but, rather, on the candidates' qualifications, education, contact with the electorate, and experience. . . (App. 50-51).

Pet. Cert. 18. According to the petitioners, the Court of Appeals ran afoul of this Court's statement in **Anderson v. City of Bessemer**, 470 U.S. 564, 573-574 (1985), that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Pet. Cert. 19.

However, **Anderson's** teaching comes into play only if the District Court's account of the evidence was "plausible." Here, it was not. While the District Court noted that the expert opinions on the meaning of the evidence "varied considerably," the Court said the "statistical evidence produced by both sides . . . was somewhat similar." Pet. App. 44. **See also** Pet. App. 46 ("the statistical findings [of the defendants' expert] were similar to the . . . findings of plaintiffs' experts.") On the basis of this undisputed analysis, the District Court concluded "there can be **no doubt** that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." Pet. App. 48 (emphasis added). This is a finding that the petitioners have never challenged.

Yet the District Court went on to conclude that "a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." Pet. App. 50. That conclusion was not plausible in light of the evidence. The "black and white politicians" to whom the petitioners refer, pet. cert. 18, were

Troy Hodges and H.L. Myrick, discussed by the District Court at pet. app. 50-51. Hodges merely said that "Race won't keep you from being elected" and "blacks won't vote for a candidate just because [the candidate] is black or white." Pet. App. 50. According to the District Court, Myrick -- a long-time black alderman elected from a majority black district -- felt he had received a strong white cross-over vote and testified that whites sometimes consider nonracial factors in casting their ballots. Pet. App. 50-51. Actually, the transcript shows that Mr. Myrick said only the following:

> Q . . . From your own personal experience and your own perception as a candidate, what have you experienced in regard to crossover voting?
>
> A I haven't experienced it. No crossover voting.
>
> * * *
>
> THE COURT: . . . Mr. Myrick, who elected you? Did you get black votes? Did you get white votes? That's what he's trying to ask.
>
> A I got both.

Tr. 559-561. Mr. Myrick went on to say that he always has run and won from a majority black district, **id**. at 561, and while he did say he got some white votes, he never said the crossover voting was "strong" or reached any other level of significance. The defendants presented no statistical analysis of the voting patterns in his election. And as the Court of Appeals noted, Mr. Myrick also testified that while black and white volunteers had assisted a particular white candidate against another white candidate, he was aware of no whites ever campaigning for a black candidate. Pet. App. 73.

Of course, if all that were necessary to defeat a Section 2 claim is for a couple of local politicians to come to Court and say that race is not an important factor, no cases ever would be won by plaintiffs and Section 2 would be a dead letter. Given the flimsy nature of these opinions from two local politicians in this case, the Court of Appeals quite correctly stated that "the defendant . . . produced no real evidence that factors other than race were at work" in the relevant elections. Pet. App. 75. Beyond that, neither the District Court nor the Petitioners have ever explained why -- if qualifications rather than race are the key factors in Attala County elections -- the voting patterns are so polarized, why no black candidate has ever received a majority of the white vote in an election against a white candidate, and why no black candidate has ever been elected in a majority white voting age population district.

The clear error rule is not a rubber stamp for any district court decision, no matter how egregious and unsupportable. Nothing about the Court of Appeals decision in this case ran afoul of the appropriate analysis under that rule. As this Court suggested in **Johnson**, where a district court's finding in a vote dilution case is based upon "a misreading of the governing law," 512 U.S. at 1022, this often leads to clear error. Here, as the Court of Appeals pointed out, the District Court misread the governing law in a number of ways -- including a disregard of the ecological regression analysis, a disregard of its own finding of polarization based upon that analysis, a displacement of that analysis by the results of a single precinct in one election and another precinct in another, and a further displacement of that analysis by the unsupported opinions of two entrenched county politicians that qualifications control the outcome of elections and not race. Pet. App. The resulting reversal by the Court of Appeals was quite proper.

Finally, with respect to the so-called "presumption," the petitioners complain that any presumption "is particularly

inappropriate in a case like the present one, where Respondents seek two BVAP majority districts (40%) in a county where blacks constitute only 35% of the voting-age population." Pet. Cert. 17. Two points are important here. First, the petitioners have never argued, in the lower courts or here, that the countywide 35% black voting age population provides them an absolute defense given that there already is one black majority voting age district and given that a second one would mean 40% of the districts are majority black in voting age population. They simply say that this aggravates the "presumption" of the Court of Appeals. Since the Court of Appeals adopted no such "presumption," this point is irrelevant to the case the petitioners seek to bring to this Court. Second, even if the petitioners had preserved such a claim independent of their "presumption" argument, this Court's decision in **Johnson** indicates that such a claim would not be viable. In **Johnson**, this Court rejected a rule that would have said, "as a matter of law no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population." 512 U.S. at 1017. If the petitioners here had made a similar argument, it would be that no dilution ever can occur in a five district plan when 20% of the seats are majority black in voting age population and the population of the relevant jurisdiction is anything less than 40% black in voting age. As this Court said in **Johnson**, such "[a]n inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" **Id**. at 1018. Indeed, if the petitioners were to prevail on such a claim, it would mean that any jurisdiction could -- as a matter of law -- construct a plan based on the notion that the 65% white voting age population is always entitled to control at least 80% of the seats, even in a polarized electoral situation where no black candidate has ever won a contested election in a majority white district, without ever being subject to scrutiny under the Voting Rights Act.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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No. 96-1695

In the Supreme Court of the United States

OCTOBER TERM, 1996

ATTALA COUNTY, ET AL., PETITIONERS

v.

BERNARD TEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals held that proof of the three *Gingles* factors in a case under Section 2 of the Voting Rights Act establishes vote dilution.

2. Whether the court of appeals misapplied the clearly erroneous standard in rejecting the district court's finding that blacks and whites prefer different candidates for reasons other than race.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Abrams v. *Johnson*, No. 95-1425, 1997 WL 331,802 (June 19, 1997) 10-11, 19

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) 15

Clark v. *Calhoun County*, 21 F.3d 92 (5th Cir. 1994) 12

Johnson v. *De Grandy*, 512 U.S. 997 (1994) 10, 13

League of United Latin American Citizens v. *Clements*, 999 F.2d 831 (5th Cir. 1993), cert. denied, 510 U.S. 1071 (1994) 16

Nipper v. *Smith*, 39 F.3d 1494 (11th Cir. 1994), cert. denied, 115 S. Ct. 1795 (1995) 8, 15

Thornburg v. *Gingles*, 478 U.S. 30 (1986) 2, 8, 10, 13, 14, 15, 20

Statutes:

Voting Rights Act of 1965 § 2, 42 U.S.C. 1973 ..... 2, 4, 6, 10, 11, 13, 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58-85) is reported at 92 F.3d 283. The district court's opinion after remand (Pet. App. 32-57) is unreported. The opinion of the court of appeals (Pet. App. 26-31) remanding to the district court is reported at 17 F.3d 796. The initial opinion of the district court (Pet. App. 1-25) is reported at 807 F. Supp. 392.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on January 22, 1997. Pet. App. 86. The petition for a writ of certiorari was filed on April 22, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents challenge the redistricting plans of Attala County, Mississippi, for the election of its five county supervisors and five election commissioners, and of its two county constables and two justice court judges, alleging that the plans dilute minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. Each candidate is elected from a single-member district by majority vote. Although African-Americans comprise 39.5% of the population in Attala County, and 35.4% of the voting age population, no black candidate has ever won a contested election from a white majority district, despite a number of attempts. Pet. App. 8, 35, 39, 41, 55 & n.16, 59. African-Americans are a minority in four of five supervisor-election commissioner districts and in both constable-justice court districts. Pet. App. 60.

1. In its first decision, the district court found that respondents failed to prove a Section 2 violation. The district court found that respondents met the first *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), precondition in that African-Americans are sufficiently numerous and geographically compact to constitute a majority in two of five supervisor districts and one of two constable districts. Pet. App. 16-17. But it found that respondents had not met the second and third *Gingles* preconditions of black political cohesion and white bloc voting. The district court rejected respondents' statistical analysis of black-white elections from 1979 to 1991 in favor of election returns from two precincts in two elections which it found showed some cross-

over voting, and anecdotal testimony of one politician that race is not a factor in county elections. *Id.* at 17-19. The district court found respondents' ecological regression analysis "nondemonstrative of a minority vote dilution claim," *id.* at 22, and rejected respondents' extreme case analysis because it analyzed only white voter preferences. *Id.* at 18-19; see also *id.* at 29.

Further, the court found that even if the three *Gingles* preconditions had been satisfied, the totality of the circumstances demonstrates that blacks and whites have an equal opportunity to elect candidates of their choice, citing the success of black candidates in black majority districts,[1] equal statewide voter registration rates for whites and blacks, improvement in the socioeconomic status of blacks over the past ten years, the lack of a candidate slating process, and no evidence of racial appeals in election campaigns. Pet. App. 7-9, 21-23. Although the district court found that "blacks continued to trail the levels of attainment for whites in every significant area," *i.e.*, income, education, housing, and employment, *id.* at 9-10, it identified voter apathy, rather than discrimination or lower socioeconomic status, as the cause of minority candidate defeat. *Id.* at 23.

2. The court of appeals vacated the district court's judgment and remanded for a more thorough examination of the evidence, particularly of respondents'

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[1] In addition to the sole black county supervisor district, there were instances of black candidate success in black majority districts of local government bodies not involved in this case—for example, aldermanic districts for towns within Attala County. See Pet. App. 7-8, 59-60.

statistical evidence on racially polarized voting. The court of appeals held:

> The district court is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists. * * * But in making its intensely fact-specific inquiry here, the district court ought to have discussed appellants' statistical evidence more thoroughly because that was the principal evidence they offered and because their statistics had at least surface plausibility. Further, the district court findings on the subjects of racial polarization and minority political cohesion are broad and general and not explicitly tied to the testimony, although many witnesses were called in the case.

Pet. App. 30.

3. On remand, the district court again concluded that the redistricting plans do not violate Section 2.[2] In reviewing the statistical evidence, the district court found that respondents' original expert, using ecological regression analysis of eight black-white elections, showed an average of 15% white support and 87% black support for black candidates, and 85% white support and 13% black support for white candidates. Pet. App. 45. Respondents' post-remand expert, using ecological regression analysis of the three post-remand elections, found that between 86.3% and 92.8% of black voters supported black candidates, while between 12% and 25.2% of white voters supported black candidates. Pet. App. 45. The United States' expert, using ecological regression analysis of six elections,

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[2] The United States intervened on remand in support of respondents.

found on average 89.5% of black voters and 17.1% of white voters supported black candidates, while 82.9% of white voters and 10.5% of black voters supported white candidates. *Id.* at 45-46; C.A. R.E. tab 12, at 11. Respondents' experts confirmed these findings using extreme case analysis. Pet. App. 47.[3]

The court found the statistical findings of petitioners' expert, who used only ecological regression analysis, "similar to the above findings of [respondent]s' experts." Pet. App. 46; see also *id.* at 44 ("[The] statistical evidence produced by both sides * * * was somewhat similar."). It concluded that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." *Id.* at 48.

Nonetheless, the district court failed to find racially polarized voting. It found that "[a]lthough statistical evidence may weigh in favor of a finding of racial polarization, the court is of the opinion that this evidence alone is not sufficient. Plaintiffs have failed to establish * * * that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors." Pet. App. 51. It came to this conclusion in spite of finding "no proof in the record that in any way compares the candidates on any basis other than race." *Id.* at 50. The court relied instead on the testimony of two local politicians who stated that factors other than race influence voters and

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[3] Because there are no homogenous black precincts in Attala County, extreme case analysis directly confirms only the white voting patterns. However, the United States' expert directly confirmed both black and white voting patterns using complementary overlapping percentages analysis, which does not require homogenous precincts. Pet. App. 62; C.A. R.E. tab 12 at 13-14 & n.14.

determine election outcomes in Attala County. *Id.* at 51. It also relied on the same two instances of black crossover voting it identified in *Teague I*: The 1991 primary election for Sheriff, Sallis precinct, where at least 232 black voters (41% of black voters) voted for white candidates, and the 1987 primary election for constable, McCool precinct, where the black candidate received only 96 votes, which, the court held, suggested that many blacks in that precinct voted for white candidates. *Id.* at 19-20; 48.

The district court went on to find that, even if respondents had proven the three *Gingles* factors, under the totality of the circumstances blacks nonetheless have an equal opportunity to participate in the political process and elect representatives of their choice. Pet. App. 52. The court made a number of findings relating to the *Gingles* factors that would suggest a Section 2 violation. It found that "no black candidate has ever won a contested election for a county office in a majority-white election district." *Id.* at 39, 55. It acknowledged the long history of discrimination against blacks in Mississippi and Attala County, *id.* at 52-53, and found that "[t]here can be no question of the socioeconomic disparities between whites and blacks in Attala County." *Id.* at 52-53. It also found that past discrimination and socioeconomic disparities have "a significant impact on present day politics in Attala County," *id.* at 55, and noted the depressed levels of black voter registration and turnout in the County.[4] *Id.* at 54. The court, how-

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[4] Notably, the court did not reiterate its finding from *Teague I* that there was no evidence of racial appeals in election campaigns. Indeed, the record contains testimony of segregationist campaign appeals in Attala County and derogatory

ever, discounted these circumstances because it found that voter apathy also has a significant impact on Attala County politics. *Id.* at 55. The court cited comparable statewide voter registration for blacks and whites, and expert testimony by a retired political science professor that national and statewide voter apathy led to a sharp decline in voter participation among both blacks and whites from 1988-1990. *Id.* at 54-55, 63.

4. On a second appeal, a different panel of the court of appeals reversed the district court, ordered entry of judgment for respondents, and remanded for remedial proceedings. The court concluded that the district court's failure to find racially polarized voting was clearly erroneous because the only outcome permitted by the record was a finding of racially polarized voting. It held that two isolated instances of *black* crossover voting and the contested testimony of two politicians that race does not affect county elections does not "overcome the admittedly compelling statistical evidence of racial bloc voting." See Pet. App. 69-70, 76. The court also held that the district court erred by "plac[ing] upon the plaintiffs the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant had itself produced no real evidence that factors other than race were at work." *Id.* at 75. Instead, the court of appeals held that "[a] defendant may try to rebut plaintiffs' claim of vote dilution via evidence of 'objective, nonracial factors under the totality of the circumstances standard.'" *Id.* at 76

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racial comments by county supervisors, including the board president. Tr. 171-173, 193-195, C.A. R.E. 13.

(quoting *Nipper* v. *Smith*, 39 F.3d 1494, 1513 (11th Cir. 1994) (en banc) (Tjoflat, C.J.), cert. denied, 115 S. Ct. 1795 (1995)).

The court overturned the district court's finding that there is no racial bloc voting. The court stated that racial bloc voting need not be "absolute" to satisfy *Gingles*; it need only be "the usual pattern for a significant portion of voters." Pet. App. 68-69 (citing *Gingles*, 478 U.S. at 57). The court stated that "[i]n the face of a strong statistical case that defendants were unable to shake, general statements that race played no role at the polls carry little weight," *id.* at 75, and that the lay testimony in this case was "ambiguous at best and certainly not dispositive." *Id.* at 76. The court stated that one of the two politicians on whose testimony the district court relied to support its finding that Attala County voters are not influenced by race also testified that whites in Attala County do not campaign for black candidates. *Id.* at 73. The court of appeals noted that a third local politician testified that there were racially hostile encounters between whites and black politicians, and that a fourth, who was a witness for petitioners, admitted that it is harder for a candidate to become popular with voters of a different race because social life in Attala County is racially segregated. *Id.* at 73-74. As in the first appeal, the court of appeals recognized that

> [t]he district court is not obliged to accept statistical evidence as conclusive on the question whether racially polarized voting exists. *Teague*, 17 F.3d at 798. Still, the district court does have an obligation to give particularized findings when it discredits the statistical evidence, especially

> where the evidence is weighty. And it is weighty here. Indeed, the district court did not even have to choose among competing opinions based on the statistics. The results of the regression analyses of both plaintiffs' and defendants' experts were consistent. And when the district court looked to lay testimony, even the anecdotal evidence was conflicting.

Id. at 74. The court agreed with the district court that statistics do not capture all the reasons motivating a voter, but faulted the district court for refusing to give any weight at all to the admittedly strong statistical evidence. *Id.* at 74-75.

The court of appeals also held that the district court clearly erred in finding that, even if the three *Gingles* preconditions were present, the totality of the circumstances demonstrates that blacks have an equal opportunity to participate in the political process. Pet. App. 80. The court of appeals noted that "[a]lthough there may be cases in which even proof of the three *Gingles* factors may not sustain a vote dilution claim, this is certainly not such a case." *Id.* at 76.

In particular, the court of appeals found "untenable" the district court's ascription of depressed levels of black political participation and black electoral losses to voter apathy, particularly in light of the "long and dubious history of discriminati[on] against blacks," the "grave socioeconomic disparities" between whites and blacks, and the 20% disparity between black and white voter registration in Attala County. Pet. App. 59, 81, 82. The court held that "[t]he record before us does not contain evidence to support the district court's conclusion that voter

apathy is the reason for the failure of blacks in Attala County to elect the candidates of their choice to political office." *Id.* at 84. Moreover, the court considered it "counterintuitive" to attribute the inability of blacks to elect candidates of their choice to apathy, when apathy affects all voters, both black and white. *Id.* at 83-84. As the court held, "[t]he fact that blacks *and* whites in Attala County are going to the polls in decreasing proportions does not explain why blacks alone are essentially shut out of the political process of the county." *Id.* at 84.

ARGUMENT

The court of appeals correctly applied Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to the record before it and correctly determined that certain key factual findings by the district court were clearly erroneous. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 16-18) that the court of appeals' decision conflicts with *Johnson* v. *De Grandy*, 512 U.S. 997 (1994), *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and seven federal appellate decisions because it applies a presumption that the presence of the three *Gingles* preconditions establishes a violation of Section 2. The court of appeals did not apply any such presumption, and its decision is therefore consistent with all of the cited cases.

De Grandy held that the three *Gingles* factors do not "necessarily and in all circumstances demonstrate[] dilution." 512 U.S. at 1011. "[C]ourts must also examine other evidence in the totality of circumstances." *Ibid.* See also *Abrams* v. *Johnson*, No. 95-

1425, 1997 WL 331802 (June 19, 1997), slip op. 15-16. Citing *De Grandy*, the court of appeals explicitly held that "a finding of the three *Gingles* preconditions does not end the inquiry. Reviewing courts are to look beyond the *Gingles* threshold factors when evaluating vote dilution claims." Pet. App. 76; see also *id.* at 65 ("Even if plaintiffs satisfy [the *Gingles*] prerequisites, the court must still look to the 'totality of the circumstances' to determine whether the challenged electoral system is equally open to minority voters.").

Petitioners construe (Pet. 15-17) the court of appeals' statement that it would be "unusual" for a plaintiff to establish the three *Gingles* factors without also establishing a violation of Section 2 as creating a legal presumption that proof of the *Gingles* factors establishes a Section 2 violation. That construction misreads the court's holding. The court of appeals stated:

> [I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act.

Pet. App. 80-81 (quoting *Clark* v. *Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994)).[5]

The court of appeals' comment clearly did not place any limits upon the district court's totality of the circumstances review, nor did it lessen the respondents' burden of proof under that standard. Instead, the court of appeals simply acknowledged that the *Gingles* preconditions typically encompass the major elements of a vote dilution claim. The court of appeals correctly noted that when plaintiffs already have established that white bloc voting routinely defeats the candidates of choice of a politically cohesive minority, a district court, before ruling against plaintiffs, must point to specific and credible evidence providing a nonracial explanation for this fact, or at least evidence weighing heavily against plaintiffs on other relevant matters (*e.g.*, historical discrimination and socioeconomic disparities) unrelated to racial bloc voting and minority electoral success. Pet. App. 72-76. In this case, the district court (after two opportunities) did neither, relying instead on arbitrary assumptions and speculative conclusions as evidence. Thus, the court of appeals' conclusion that the district court erred in its totality of the circumstances analysis was a straightforward application of established law.

The court of appeals' decision is entirely consistent with *De Grandy*, *Gingles*, and the seven court of appeals decisions cited in petitioners' footnote. See Pet. 16-17 n.7. After examining the three *Gingles* factors, the court of appeals examined other relevant

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[5] The three court of appeals decisions that petitioners cite in a footnote (Pet. 16 n.6) as similarly in conflict with *De Grandy* contain the same language.

considerations to determine whether the totality of the circumstances established vote dilution in violation of Section 2. Pet. App. 76-84. It did not limit the "canvassing of relevant facts," *De Grandy*, 512 U.S. at 1011, as petitioners contend. Pet. 16. Rather, it held that blacks do not have an equal opportunity to participate in the political process and elect candidates of their choice only after a "searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 79 (internal citation omitted). In addition to the three *Gingles* factors, the court cited Mississippi's "long and dubious history of discriminati[on] against blacks," the current "grave socioeconomic disparities" between blacks and whites, Pet. App. 81, the depressed levels of black political participation in Attala County, and the fact that no black has ever been elected to office in a contested election from a majority white district. *Id.* at 59-60, 82-84. The court also evaluated, and rejected as without evidentiary support, the district court's finding of voter apathy as the cause of black electoral losses, and noted the lack of evidence in the record to support any other nonracial explanation of the statistical evidence. *Id.* at 83-84.

Indeed, it was the district court that limited its totality of the circumstances review. As the court of appeals pointed out:

> [t]he district court did not take adequate notice of the considerable statistical evidence of vote dilution. The conclusion it drew in its totality discussion is similarly dubious, relying entirely on the denials of a few lay witnesses and ignoring the contrary testimony of others. The district court did not place this testimony in the context

> of the area's history of voter exclusion nor give voice to any plausible nonracial explanation for Attala County's voting patterns.

Pet. App. 81. Thus, contrary to petitioners' contention, the court of appeals followed clearly established standards for determining whether Section 2 has been violated. [6]

2. Petitioners advance two related contentions regarding the court of appeals' treatment of the racial bloc voting issues in the case. They contend that the court of appeals "confined Petitioners' proof of nonracial explanations [for the different voting patterns of black and white voters] to evidence that voters choose candidates based on partisanship, not race," Pet. 23, and that the court of appeals "improperly substitut[ed] its view of the facts for that of the District Court" regarding whether "county voters cast their ballots not on the basis of race but, rather, on the candidates' qualifications, education, contact with the electorate, and experience," Pet. 18. Those contentions are wrong. The court of appeals did not limit the evidence that could be considered on these issues, and it correctly articulated and applied the well-established clearly erroneous standard. As the court stated, under that standard "a finding is 'clearly

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[6] Petitioners' contention (Pet. 17-18) that the court of appeals collapsed the second and third *Gingles* factors into a single statistical analysis is wrong. The court of appeals separately considered black political cohesion and white bloc voting. See Pet. App. 69-71. Black political cohesion was evidenced by ecological regression analysis of black voting preferences. White bloc voting was evidenced by ecological regression analysis and extreme case analysis of white voter preferences. That is the standard method of proving racially polarized voting by blacks and whites. See *Gingles*, 478 U.S. at 52, 55-61.

erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Pet. App. 64 (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985)).

a. The court of appeals did not improperly confine petitioners' proof. In reviewing the district court's findings, the court recognized that "[t]he analysis the district court must make to evaluate a § 2 claim is [a] fact-intensive [inquiry], requiring 'an intensely local appraisal of the design and impact of the contested electoral mechanisms.'" Pet. App. 64 (quoting *Gingles*, 478 U.S. at 79). Further, the court of appeals held that under the totality of the circumstances "[a] defendant may try to rebut plaintiffs' claim of vote dilution via evidence of 'objective, nonracial factors'" that explain voting patterns. *Id.* at 76 (quoting *Nipper* v. *Smith*, 39 F.3d 1494, 1513 (11th Cir. 1994) (en banc) (Tjoflat, C.J.), cert. denied, 115 S. Ct. 1795 (1995)). However, in this case, the court of appeals stated that the record "is devoid of any proof that [nonracial] factors * * * are as or more important than race in predicting voting behavior in Attala County." *Id.* at 72. Even the district court found "no proof in the record that in any way compares the candidates on any basis other than race." *Id.* at 50. The court of appeals thus could not have limited petitioners' proof of nonracial factors because there was no such evidence in the record.

Petitioners select (Pet. 23) one sentence from the court of appeals' opinion to support their claim that the court limited its review of nonracial explanations to partisan politics. The court of appeals stated:

> We are not denying that the ultimate inquiry of Section 2 is racial discrimination; nor are we holding that a defendant cannot offer evidence of the nonracial reasons for the voting patterns. In *LULAC* we did not hold that the plaintiff has the burden of negating all nonracial reasons possibly explaining plaintiffs' statistical case. *That case concerned a different problem—the role of partisan politics.*

Pet. App. 84 (emphasis added). This discussion of *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994), does not suggest that the court has improperly limited the proof of nonracial explanations to partisan politics. The court simply contrasted *LULAC*, in which the court of appeals found that defendants offered substantial, objective evidence that partisan politics better explained the electoral outcomes, to this case, in which there was no objective evidence of *any* nonracial explanation and the district court improperly required plaintiffs to disprove all possible nonracial explanations. See Pet. App. 84.

b. The court of appeals correctly applied the clearly erroneous standard in rejecting petitioners' claim that black and white voters prefer different candidates for reasons other than race. This is not a case in which the court of appeals substituted its judgment for the district court's by choosing between two plausible views of the evidence, as petitioners allege. See Pet. 19. The district court's analysis misapplied the burden of proof. See Pet. App. 72, 74-75. In addition, the district court disregarded the standard methodology for proving racial bloc voting approved

by this Court, see *id.* at 69, 72, 75, and disregarded the court of appeals' remand order that it should base its conclusions on particularized findings of fact, see *id.* at 75. As the court of appeals held, the evidence of racial polarization was "overwhelming," *id.* at 70, 75, and the district court's failure to find racial polarization was not supported by the evidence. See *id.* at 69, 72, 74, 76.

(i). The district court misapplied the burden of proof by improperly "plac[ing] upon the [respondents] the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant had itself produced no real evidence that factors other than race were at work." Pet. App. 75; see also *id.* at 72, 74. Petitioners admit that it would be error to require such a showing, but claim that the district court committed no such error. Pet. 24 n.8.

To the contrary, the district court's error is clear. The district court found that respondents "failed to establish that voters in Attala County cast their vote on the basis of race, to the exclusion of other nonracial factors, such as a candidate's experience, qualifications, education and contact with the electorate." Pet. App. 51. It made this finding even though it acknowledged that "[c]onspicuously missing from the record in this [case] is any proof to the contrary. Of the black-white elections analyzed, there is no proof in the record that in any way compares the candidates on any basis other than race." *Id.* at 50. And as the court of appeals pointed out, "[t]he lack of evidence in the record on this point favors the [respondents], not the [petitioners]." *Id.* at 72.

(ii). In weighing the evidence, moreover, the district court clearly erred by placing undue weight on

isolated instances of *black* crossover voting in two precincts in two elections and on controverted, conclusory testimony of two politicians, and by disregarding the consistent evidence of racially polarized voting spanning 13 years that the district court itself found to be strong. See Pet. App. 47-48, 51, 69-74. Petitioners state that "[t]he District Court found that the expert testimony presented by the parties 'on racial bloc voting patterns varied considerably.'" Pet. 18 (quoting Pet. App. 44). But this partial quotation is incomplete. The district court's full finding is: "At trial, *expert testimony* on racial bloc voting patterns varied considerably, although *statistical evidence* produced by both sides on the same was somewhat similar." Pet. App. 44 (emphasis added). The district court reiterated that the statistical findings of petitioners' expert "were similar to the above findings of [respondents'] experts," *id.* at 46,[7] and found that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting in Attala County." *Id.* at 48; see also *id.* at 51.

The court of appeals found that the meager, conjectural and controverted rebuttal evidence identified by the district court simply did not support the dis-

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[7] Petitioners' expert report shows levels of estimated white and black support for black candidates similar to the levels found by respondents' experts. See Defs.' Response to Pls.' Post-Remand Evidentiary Proffer and Defs.' Proffer, Attach. B, Tables 1 & 2 (filed July 8, 1994). Petitioners' expert also conceded that racial polarization exists in exogenous elections. *Id.*, Attach. A, Weber Decl. ¶ 11 (analyses of congressional elections "reveal a pattern of some racial differences in voting preferences"); *id.* at ¶ 12 (finding "[r]acial polarization in voting" in analyses of exogenous county-wide or state-wide elections).

trict court's conclusion that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." Pet. App. 50. The court of appeals acknowledged that "while the [district] court does have discretion in the manner in which it weighs the facts, the statistical evidence here is so one-sided as to require a more convincing discussion of the lay testimony before refuting the objective results." *Id.* at 76.[8] As the court of appeals held, "[i]n the face of a strong statistical case that [petitioners] were unable to shake, general statements that race played no role at the polls carry little weight." *Id.* at 75. Accordingly, the court of appeals correctly concluded that the record

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[8] In *Abrams* v. *Johnson*, No. 95-1425, 1997 WL 331,802 (June 19, 1997), this Court reiterated the legal principles applied by the court of appeals in this case. *Abrams*, slip op. 15-16. The Court held in *Abrams* that the three-judge district court's findings of lack of racially polarized voting were adequately supported by the record in that case. That conclusion is entirely consistent with the court of appeals' finding that, on the much stronger evidence in this case, the district court had clearly erred in finding a lack of racially polarized voting. In *Abrams*, "the statistical evidence was for the most part inconclusive and conflicting." *Abrams*, slip op. 17. Here, by contrast, the statistical evidence presented by both sides was consistent and demonstrated the existence of racially polarized voting. See Pet. App. 48, 69. Finally, the *Abrams* district court found "a general willingness of white voters to vote for black candidates," slip op. 18, and it noted that candidates of choice of black voters had "achieved many electoral victories in local and statewide elections and have received significant—occasionally overwhelming—support from both black and white voters" in the district at issue there. Slip op. 17. No such findings were made—or could have been made—on the record in this case.

in this case did not support the district court's failure to give proper weight to the consistent results of regression and extreme case analyses in disregard of the racial bloc voting methodology approved by this Court in *Gingles*, 478 U.S. at 52, 55-61. The court of appeals' record-specific application of established legal principles warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY

BRIEF

Supreme Court, U.S.
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No. 96-1695 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ATTALA COUNTY, MISSISSIPPI, *et al.*,

Petitioners,

v.

BERNARD TEAGUE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE COURT OF APPEALS IMPROPERLY PRESUMED THAT PROOF OF THE THREE *GINGLES* PRECONDITIONS ESTABLISHES A VIOLATION OF § 2 OF THE VOTING RIGHTS ACT 2

II. THE COURT OF APPEALS IMPROPERLY LIMITED PETITIONERS' PROOF OF NONRACIAL EXPLANATIONS FOR DIFFERENCES IN VOTING PATTERNS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

Abrams v. Johnson, Nos. 95-1425 & 95-1460 (U.S. June 19, 1997) 8

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985) 6, 8

Johnson v. De Grandy, 512 U.S. 997 (1994) ... *passim*

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) 8

League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc) 9

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*

Statutes:

§ 2 of the Voting Rights Act, 42 U.S.C. § 1973 ..... *passim*

Miscellaneous:

1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* (2d ed. 1994) 4

INTRODUCTION

Petitioners Attala County, Mississippi, *et al.* have argued that this Court should grant certiorari to resolve the conflict between the opinion of the Court of Appeals in this case and the opinions of this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Johnson v. De Grandy*, 512 U.S. 997 (1994). In reply, Respondents Bernard Teague, *et al.* ("Teague Respondents") contend that this is "a garden variety redistricting case" that presents no conflict with the decisions of this Court. Brief in Opposition for Respondents Bernard Teague, et al. ("Teague Opp.") 1; *see also* Brief for the United States in Opposition ("U.S. Opp.") 10 (arguing that the Court of Appeals' opinion "does not conflict with any decision of this Court or any other court of appeals").

In a garden variety redistricting case, however, the court of appeals does not presume a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, from proof of the three *Gingles* preconditions, but rather conducts a "comprehensive . . . canvassing of relevant facts," as *De Grandy* requires. 512 U.S. at 1011. In a garden variety redistricting case, the court of appeals does not substitute its view of the evidence for that of the district court, but rather defers to the district court's findings unless they are clearly erroneous, as *Gingles* requires. *See* 478 U.S. at 78-79. And in a garden variety redistricting case, the court of appeals does not limit the nonracial explanations that defendants may offer to explain differences between the voting patterns of blacks and whites, but rather considers the full range of such explanations, as *Gingles* and the plain language of the statute require. *See id.* at 79. Thus, this is not a garden variety case, and Court should grant the writ of certiorari.

I. THE COURT OF APPEALS IMPROPERLY PRESUMED THAT PROOF OF THE THREE *GINGLES* PRECONDITIONS ESTABLISHES A VIOLATION OF § 2 OF THE VOTING RIGHTS ACT

As discussed in the Petition (at 14-17), the Court of Appeals created a presumption that proof of the *Gingles* preconditions establishes vote dilution, stating:

> "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act."

Appendix to the Petition for a Writ of Certiorari ("App.") 80-81 (alteration in original) (citation omitted). As Petitioners have shown, this holding conflicts with *De Grandy*, which holds that proof of the three *Gingles* factors does not suffice to establish § 2 liability and that courts must engage in a "comprehensive, not limited, canvassing of relevant facts" in deciding whether § 2 has been violated. 512 U.S. at 1011.

The Teague Respondents claim that the Court of Appeals' holding is actually "quite similar to what this Court said in *Johnson* [*v. De Grandy*]: '[L]ack of equal electoral opportunity may be readily imagined and *unsurprising* when demonstrated under circumstances that

include the three essential *Gingles* factors.'" *Id.* (quoting 512 U.S. at 1012). The juxtaposition of the quotations from *De Grandy* and the Court of Appeals' opinion, however, demonstrates the Court of Appeals' error. It is one thing to say that a § 2 violation "*may* be readily imagined and unsurprising" when plaintiffs prove "circumstances that *include*" the *Gingles* preconditions. 512 U.S. at 1012 (emphasis added). It is quite another to say that it "*will* be only the *very unusual* case" in which plaintiffs prove the *Gingles* preconditions but do not win. App. 80 (emphasis added). The former statement says that § 2 plaintiffs may very well win their case if they can prove the *Gingles* preconditions and other circumstances. The latter says that § 2 plaintiffs will hardly ever lose if they can prove the *Gingles* preconditions.

The Teague Respondents also contend that the latter statement is not a presumption but "simply a description of the empirical fact that most plaintiffs who [prove] the three *Gingles* factors go on to prove a violation [of § 2]." Teague Opp. 15. But the message such a "description" sends is unmistakably clear: if the *Gingles* preconditions are satisfied, district courts run a high risk of reversal if they do not also find a § 2 violation. Thus, despite what the Teague Respondents claim, the Court of Appeals did create a *de facto* presumption that proof of the *Gingles* preconditions establishes a § 2 violation.

That the Court of Appeals did so is confirmed by the United States. According to the United States' brief, U.S. Opp. 12, the Court of Appeals

> correctly noted that when [§ 2] plaintiffs already have established that white bloc voting routinely defeats the candidates of choice of a politically cohesive minority, a district court,

> before ruling against plaintiffs, must point to specific and credible evidence providing a nonracial explanation for this fact, or at least evidence weighing heavily against plaintiffs on other relevant matters (*e.g.*, historical discrimination and socioeconomic disparities) unrelated to racial bloc voting and minority electoral success.

In other words, the United States contends that if plaintiffs prove racially polarized voting, they should prevail, unless the district court can "at least" point to other "evidence weighing heavily against [them]."

This contention confirms that the Court of Appeals adopted a presumption that proof of racially polarized voting constitutes proof of vote dilution in violation of § 2. *See* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 79, at 376 (2d ed. 1994) ("In civil cases, 'presumption' means a position or stance that must be taken in the absenc of counterproof challenging the basic or presumed facts."). As with other presumptions, the presumption created by the Court of Appeals here has "the effect of shifting the burden of production to the party who would be disadvantaged by a finding of the presumed fact." *Id.* § 66, at 320. That is, once plaintiffs prove the *Gingles* preconditions, defendants must come forward with "evidence weighing heavily against plaintiffs," U.S. Opp. 12; otherwise, plaintiffs will win.

The United States cites no support for this shift in the burden of production, other than the Court of Appeals' opinion, and Petitioners submit that this shift contravenes both *De Grandy* and *Gingles*. In *De Grandy*, this Court held that the *Gingles* preconditions are necessary, but not sufficient, to prove a § 2 claim, 512 U.S. at 1012, and

stated that "factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution." *Id.* at 1013. Under the United States' argument, however, the *Gingles* preconditions are effectively presumed sufficient, unless the district court finds other evidence that "weigh[s] heavily against plaintiffs." As Petitioners have shown, such a ***de facto*** presumption contravenes *De Grandy*'s requirement that a district court make a "comprehensive, not limited, canvassing of relevant facts," *id.* at 1011, and *Gingles*' requirement of "a searching practical evaluation of the past and present reality [to determine] whether the political process is equally open to minority voters," 478 U.S. at 79 (internal quotation marks and citation omitted).[1]

The Court of Appeals' creation of a ***de facto*** presumption that shifted the burden of production to Petitioners warrants granting the Petition. This is so even assuming ***arguendo*** that the Court of Appeals correctly ruled that Respondents proved racially polarized voting. *See De Grandy*, 512 U.S. at 1007-09 (reversing judgment for plaintiffs even though they proved polarized voting).

It is important to remember, however, that the Court of Appeals aggravated the error resulting from the presumption it created in at least two ways. First, the

[1]The United States contends that the Court of Appeals did perform the "searching practical evaluation" that *Gingles* requires by examining Mississippi's history of discrimination, the socioeconomic disparities between blacks and whites, the depressed level of black political participation, and the absence of minority success in majority white districts. U.S. Opp. 13. But the Court of Appeals made this examination only after creating the erroneous presumption discussed above, and, by doing so, improperly "isolat[ed] . . . other arguably relevant facts [*i.e.*, all those other than racially polarized voting] from the act of judgment." *De Grandy*, 512 U.S. at 1012.

Court of Appeals applied the presumption when Respondents sought over-proportional representation (*i.e.*, two black voting-age population ("BVAP") majority districts, out of a total of five, in a county that has a BVAP of only 35%).[2]

The Court of Appeals further aggravated its error by failing to accord due deference to the District Court's findings regarding polarized voting. Under *Gingles* and *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985), these findings must be affirmed unless clearly erroneous, *i.e.*, unless they are not "plausible in light of the record viewed in its entirety." *Id.* at 573-74.

Respondents answer by saying that the Court of Appeals correctly applied the "clearly erroneous" standard because the District Court's view of the evidence was implausible. Teague Opp. 17; U.S. Opp. 16. In particular, Respondents claim that the District Court erred in relying on the testimony of two local politicians to support its conclusion that voters in Attala County choose candidates on the basis of their qualifications rather than their race. Teague Opp. 17-19; U.S. Opp. 18-19. Respondents characterize this testimony as "flimsy," Teague Opp. 19, "controverted," and "meager," U.S. Opp. 18, and assert that the District Court "plac[ed] undue weight" on it, instead of giving "proper weight" to Respondents' statistical evidence, *id.* 17, 20.

But Respondents' characterizations of the evidence merely prove Petitioners' point that the evidence in this case was vigorously disputed. Respondents' experts

[2]Contrary to what the Teague Respondents claim, Teague Opp. 20, Petitioners do not contend that the County's 35% BVAP provides them with an "absolute defense" to Respondents' claims. Rather, Petitioners claim only that the County's BVAP makes the Court of Appeals' error particularly grave.

offered statistical evidence to prove polarized voting. Petitioners' expert offered "somewhat similar" statistical evidence, but his opinions "varied considerably" from those of Respondents' experts. App. 44.[3] Petitioners also offered lay testimony that "support[ed] [Petitioners'] claims that nonracial factors influence voters and determine election outcomes in Attala County." App. 51.

In particular, Petitioners offered testimony from Troy Hodges, the County Supervisor from District 3, who testified that "'Race won't keep you from being elected'" and that "'blacks won't vote for a candidate just because [the candidate] is black or white.'" App. 50 (alteration in original) (citations omitted). Petitioners also offered testimony from H.L. Myrick, a black alderman who "testified that black and white citizens vote not on the basis of skin color, but on the basis of the candidate and his qualifications." App. 50-51.[4]

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[3]The United States takes Petitioners to task for citing the District Court's finding that the expert testimony "varied considerably," but omitting the District Court's finding that the statistical evidence offered by both parties' experts was "somewhat similar." U.S. Opp. 18 (discussing Petition 18). What the United States ignores, however, is that, earlier in the Petition (at 5), Petitioners were careful to note both that the findings of their expert were similar to those of Respondents' experts and that their expert disagreed vehemently with Respondents' experts as to what the statistics actually proved regarding racial polarization.

[4]The Teague Respondents claim that Myrick's testimony does not support the District Court's finding. In particular, they quote Myrick's testimony that "I haven't experienced" crossover voting (*i.e.*, whites voting for black candidates and vice versa). Teague Opp. 18 (citing Tr. 559-61). The Teague Respondents, however, omit Myrick's subsequent testimony that he did not understand the question about crossover voting, Tr. 560; and they admit that Myrick later testified that he "got both" black and white votes in his election campaign, Teague Opp. 18 (citing Tr. 561). And although the Teague

Faced with this disputed record, the District Court weighed the evidence and found that "there can be no doubt that the statistical evidence in the record favors a finding of racial bloc voting." App. 48. But the District Court also found that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County." App. 50. Given that the District Court (unlike the Court of Appeals) was in a position to gauge the demeanor of the witnesses, and given that court's "particular familiarity with the indigenous political reality," *Gingles*, 478 U.S. at 79, the trial judge's findings regarding the disputed evidentiary record cannot be deemed implausible. Accordingly, under the "clearly erroneous" standard of review, the Court of Appeals should have deferred to the District Court's findings, and its failure to do so conflicts with this Court's holdings in *Gingles* and *Anderson*.[5]

Respondents claim that Myrick "was aware of no whites ever campaigning for a black candidate," *id.*, they overlook his testimony that whites "worked to help me get elected," Tr. 575-76.

[5]The Court of Appeals' substitution of its view of the evidence for that of the trial court also conflicts with *Abrams v. Johnson*, Nos. 95-1425 & 95-1460 (U.S. June 19, 1997). In *Abrams*, this Court reiterated that a trial court's findings regarding the *Gingles* preconditions are "owed deference" and are reviewed only for clear error. *Abrams*, slip op. at 20. Although the United States attempts to distinguish *Abrams*, U.S. Opp. 19 n.8, numerous similarities exist between that case and the present one. In *Abrams*, as in the present case, the United States' expert, using the same statistical techniques employed here, opined that voting was racially polarized. *See Johnson v. Miller*, 864 F. Supp. 1354, 1390 (S.D. Ga. 1994). Like the County's lay witnesses here, lay witnesses in *Abrams*, including a black politician, testified that significant white crossover voting occurred. *Abrams*, slip op. at 17. And, like the District Court here, the district court in *Abrams* credited this testimony. *Id.*

II. THE COURT OF APPEALS IMPROPERLY LIMITED PETITIONERS' PROOF OF NONRACIAL EXPLANATIONS FOR DIFFERENCES IN VOTING PATTERNS

As discussed above, the Court of Appeals rejected Petitioners' nonracial explanations for differences in black and white voting patterns. In so doing, the Court of Appeals distinguished *League of United Latin American Citizens, Council No. 4434 v. Clements,* 999 F.2d 831 (5th Cir. 1993) (en banc), on which Petitioners relied, on the ground that it "concerned a different problem -- the role of partisan politics." App. 84.

The Teague Respondents claim that "*LULAC* was never used by the Court of Appeals to restrict nonracial explanations in this case to partisan voting. . . . [T]he Court of Appeals instead held that the District Court erred because there was 'no real evidence that [any] factors other than race were at work' in the relevant elections." Teague Opp. 13 (second alteration in original) (citation omitted); *see also* U.S. Opp. 16 (making a similar argument).

In holding that there was "no real evidence that [any] factors other than race were at work" in County elections, App. 75, the Court of Appeals erroneously substituted its view of the evidence for that of the District Court. Moreover, in rejecting Petitioners' argument that voting patterns were better explained by candidates' qualifications, education, and experience than by race, the Court of Appeals effectively limited Petitioners' evidence of nonracial explanations to differences in party affiliation. By limiting Petitioners' proof in this manner, the Court of Appeals ran afoul of the language of § 2 and this Court's

decision in *Gingles*. *See* Petition 23-24. For this reason as well, this Court should grant the Petition.[6]

CONCLUSION

For all of the reasons cited above and in the Petition, a writ of certiorari should issue to review the decision of the Court of Appeals in this case.

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[6]In defending the Court of Appeals' treatment of the issue of nonracial explanations for differences in black and white voting behavior, the United States contends that the District Court erroneously imposed on Respondents the burden of disproving all nonracial explanations for the voting patterns. As Petitioners have shown, however, the District Court did not do so, and its treatment of the burden of proof was proper. Petition 24 n.8.